Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

COOK INLET PROCESSORS, INC.,
Petitioner,

GRANT BAKER, as class representatives of the Mandatory Punitive Damages class; and all persons similarly situated; et al.
Respondants; and

EXXON CORP., aka Exxon Mobil Company; Captain JOSEPH HAZELWOOD; EXXON SHIPPING CO.,
Respondants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## I. QUESTIONS PRESENTED FOR REVIEW.

1. Under the Seventh Amendment to the United States Constitution, and the applicable common law, procedural laws, and substantive laws, does a district court have the authority to disregard a jury verdict finding each member of a class entitled to punitive damages based upon liability "evidence" that was available during the trial, but that was never asserted by the defendant, nor admitted into evidence, and an affirmative defense and legal theory that was never asserted by the defendants or considered by the jury?

2. In a mandatory punitive damages class action (with multiple categories of claimants asserting punitive damages and individual compensatory damages claims), does it violate basic notions of res judicata, due process and finality to deprive, post-verdict and post-approval of the plan of allocation of punitive damages to each category of claimant, a class member of such punitive damages to which a jury has ruled each member of the class is entitled, during the distribution of the proceeds of that verdict, by summary reliance on purported affirmative defenses which were never properly procedurally or substantively pled, litigated or considered by the jury?

2. May a district court, through the approval of a plan of distribution which functionally excludes a class member, divest, via such post-verdict summary resurrection of such forfeited and waived affirmative defenses (i.e., alleged pre-suit partial releases and/or accord and satisfaction), a class

member of its right to share in a punitive damages verdict awarded by the jury to the class after that class member has detrimentally procedurally and substantively relied on inclusion in the class, a joint prosecution agreement, inclusion in a plan of allocation between categories of class members, and an express "guarantee" of sharing in the punitive damage verdict proceeds in giving up its rights to proceed to try its compensatory damages claims?

3. May a district court discriminate against a member of a mandatory punitive damages class certified pursuant to Federal Rule of Civil Procedure 23 to preclude that class member from enjoying full participation in the distribution of the proceeds of a punitive damages jury verdict to the members of the class based upon summary eleventh hour invocation of an alleged pre-suit "release" of punitive damages purportedly executed by that individual class member when that "release" was never asserted pretrial as an affirmative defense as required, or tried to the jury as such a defense to the punitive damages claims of the members of the mandatory punitive damages class, and when it was asserted for the first time years after the jury verdict holding that each member of the mandatory punitive damages class was entitled to an award of punitive damages, thereby summarily reversing the findings of the jury as to a specific class member?

4. May a district court summarily rely, post-verdict and post-approval of a plan of allocation, on the terms of a so called pre-suit "release" in excluding a member of a mandatory punitive damages class from sharing in the

distribution of proceeds of a punitive damages verdict awarded to the class, when neither that document, nor the class member's defenses to the use of the terms of the document, such as economic coercion, and fraud in the inducement, were tried to or adjudicated by the jury, and as to which the affected class member was not given notice and an opportunity to present its defenses to the enforcement of the alleged "release" before such jury?

5. May a district court approve a plan of distribution of proceeds of punitive damages that discriminates against a class member based upon the recommendation of a "plaintiffs' committee" that authored the plan and engineered said discrimination, when such discrimination is contrary to a joint prosecution agreement, and a "guarantee" in the plan of allocation to the class members, of sharing in such punitive damages proceeds to receive at a minimum compensation for compensatory damages, on which joint prosecution agreements and guarantee the class members relied, when the representative of that committee candidly admitted, prior to the district court's approval of said eleventh hour discrimination in the plan of distribution, that the plaintiffs' committee had refused to consider the legal validity of the "release" it relied upon in formulating its discriminatory distribution plan, or the effected class member's defenses to the use of the alleged terms of the document?

6. Does it violate a class member's rights to due process of law, right to jury trial and fundamental fairness to summarily preclude a member of a mandatory punitive

damages class from participating fully in the distribution of a jury award of punitive damages to the mandatory punitive damages class based upon summary invocation of an alleged pre-suit "release" of punitive damages asserted for the first time after the jury verdict?

## II. LIST OF PARTIES

COOK INLET PROCESSORS, INC.,
Petitioner,

GRANT BAKER, as class representatives of the Mandatory Punitive Damages class; and all persons similarly situated; ALASKA SPORT FISHING ASSOCIATION; LOUIS E. ALBER, AHMET ARTUNER; JEFFREY BAILEY; WILLIAM BENNETT; MICHAEL WAYNE BULLOCK, ROBYNE L. BUTLER; ALBERT RAY CARROLL; DEBRA LEE, INC.; DEW DROP, INC.; LARRY L. DOOLEY, MARK DOUMIT; STEVE DOUMIT; DOUGLAS R. JENSEN; DENNIS G. JOHNSON; DONALD P. KOMPKOFF, Sr.; JOSEPH KOPECKY; DANIEL LOWELL; ANDREAN E. MARTUSHEFF; CAROL ANN MAXWELL; JACQUELAN JILL MAXWELL; ROBERT A. MAXWELL, Sr.; MICHAEL McLENAGHAN; ELENORE E. McMULLEN; LESLIE R. MEREDITH; NATIVE VILLAGE OF TATITLEK; LEONARD S. OGLE; STEVEN T. OLSEN; AUGUST M. PEDERSEN, Jr.; MARY LOU REDMOND; JOSEPH DAVID STANTON; JEAN A. TISDALL; DARRELL WOOD,
Respondants; and

EXXON CORP., aka Exxon Mobil Company; Captain JOSEPH HAZELWOOD; EXXON SHIPPING CO.,
Respondants.

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Petitioner, Cook Inlet Processors, Inc., respectfully prays a Writ of Certiorari issue to review the judgment and opinion herein of the United States Court of Appeals for the Ninth Circuit and the United States District Court for the District of Alaska.

## V. REFERENCE TO OPINIONS IN THE CASE.

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was rendered in an unpublished memorandum opinion filed December 14, 2000 in Ninth Circuit No. 99-35864 and the related case of Nautilus Marine Enterprises, Inc., Plaintiff-Appellant v. Grant Baker, et al., Plaintiffs-Appellees, and Exxon Corp., et al., Ninth Circuit Case No. 99-35866, (consolidated for purposes of proceedings in the Ninth Circuit) (Appendix (hereinafter "App.") 1). Petitioner's Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied January 26, 2001. (App. 38.) The Honorable H. Russel Holland's unpublished findings and conclusions were entered July 23, 1999 in United States District Court Alaska Case No. A89-095-CV (HRH) (Consolidated). (App. 31-37.) Also relevant to this case are the Ninth Circuit's decisions in the related cases of Icicle Seafoods, Inc., et al. and Exxon Shipping Company, et al. v. Grant Baker, et al., Ninth Circuit Court of Appeals No. 96-36038; Icicle Seafoods, Inc., et al. v. Alaska Sportsfishing Association, Inc., et al., Ninth Circuit Court of Appeals No. 97-35036, and Icicle Seafoods, Inc., et al. v. Grant Baker, et al. v. Exxon Corporation, et al., Ninth Circuit Court of Appeals No. 97-35190 (App. 5-26), and in Sea Hawk Seafoods, Inc., et al, and Western Alaska Fisheries Inc., v. Exxon Corp and Discovery Master, No. 99-35878 (App. 27-30.)

## VI. STATEMENT OF RELATED CASE

Also filed this day is a petition for certiorari in the related case of Nautilus Marine Enterprises, Inc., Plaintiff-Appellant v. Grant Baker, et al., Plaintiffs-Appellees, and Exxon Corp., et al., Ninth Circuit Case No. 99-35866, which involves many of the same facts and issues as raised in the instant matter, and which likewise requires an exercise of this Court's supervisory powers.

## VII. GROUNDS FOR JURISDICTION.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1254. The Petition is timely as the initial Judgment and Opinion was filed December 14, 2000; a timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied January 26, 2001.

## VIII. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Fifth Amendment of the United States Constitution, the Seventh Amendment of the United States Constitution, and Rule 23 of the Federal Rules of Civil Procedure. Those Constitutional Provisions provide:

> **Fifth Amendment; United States Constitution**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Juyr, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Seventh Amendment; United States Constitution**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rule 23 of the Federal Rules of Civil Procedure is set out in the Appendix, pages 132-134.

## IX. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

This petition seeks review of the Ninth Circuit's opinion in Case Number 99-35864, an appeal by Cook Inlet Processors, Inc. (hereafter "Cook Inlet" or Cook Inlet Processors), in which the Ninth Circuit affirmed the trial court's order approving the eleventh hour discrimination against Cook Inlet, summarily divesting it of its share as a class member of a mandatory punitive damages class, of punitive damages awarded to the members of that class by

the jury, via a "seafood processor plan of distribution" resulting from the "Exxon Valdez oil spill litigation," which plan of distribution was contrary to the plan of allocation, joint prosecution agreement, and class certification on which Cook Inlet had relied. Cook Inlet had appealed the approval of the plan of distribution of funds that included the proceeds of a punitive damages jury verdict awarded to the members of the mandatory punitive damages class. That plan arbitrarily, summarily and at the eleventh hour, with no proper procedural or substantive notice, pleading, adjudication, or jury consideration, excluded Cook Inlet from receiving punitive damages proceeds on the basis of "affirmative defenses" that were never raised in a timely fashion, even though Cook Inlet was a member of the class to which the jury awarded punitive damages. Thus, said appeal was asserted on the grounds that the mandatory affirmative defense of the alleged pre-suit "release" of punitive damages claims used to summarily exclude Cook Inlet during the distribution phase had never been properly procedurally or substantively raised, litigated or considered by the jury and had been substantively, procedurally, and strategically abandoned by the Exxon defendants as part of their trial strategy (presented to the jury in the form of Exxon's testimony that it had only received "receipts" for the settlement money that it had paid out and not "releases"). Thus, the terms of the document and Cook Inlet's defenses to same were not presented to the jury, but were, rather, asserted for the first time after the jury verdict finding Exxon liable for punitive damages to the members of the punitive damages class. However, both the plaintiffs' committee and the district court belatedly seized on the terms of the document at the eleventh hour, despite the jury verdict, longstanding principles of res judicata and finality, Cook Inlet's reliance (in foregoing its right to individually seek compensatory damages) on its status as a class member and

signatory to the joint prosecution agreement, Cook Inlet's inclusion in the earlier plan of allocation, with an expressed "guarantee" in such plan of allocation of Cook Inlet's entitlement to share in said punitive damages proceeds, and Exxon's abandonment of the provisions of those documents, and the plaintiffs' committee used the document to summarily divest Cook Inlet of its right to share in the punitive damages verdict awarded to it. Despite its objections, Cook Inlet was provided neither a jury trial nor an opportunity for discovery or to present its defenses to the assertion of "release" (such as fraud, reliance, economic duress, etc.) and the use of the terms of that document to exclude it from receiving those damages to which the jury found Cook Inlet entitled. In fact, neither the plaintiffs' committee nor the court considered or adjudicated the actual legal validity of the purported "release" or Cook Inlet's defenses to same, but simply accepted a prejudicial interpretation of the language with no proper opportunity for notice, defense, discovery, or adjudication by a jury.

## A. INTRODUCTION

What occurred in this case was that a mandatory punitive damages class action against Exxon was certified. Cook Inlet Processors was part of that class. The punitive damages claims went to the jury, which returned a verdict in favor of the members of the punitive damages class of $5 billion. During the jury trial, Exxon did not properly procedurally or substantively assert the mandatory affirmative defenses of release or accord and satisfaction with relation to any of the individual members of the class. Rather, Exxon told the jury that Exxon had paid out substantial sums of money and only obtained "receipts" in return, and not "releases," thereby attempting to invoke the sympathy of the punitive damages jury. Whether or not

Exxon's strategy actually worked would be speculation. However, the fact remains that the punitive damages jury awarded the members of the mandatory punitive damages class $5 billion in punitive damages against Exxon. Dissatisfied with the jury verdict. Exxon then attempted to raise the terms of several documents which it deemed were releases and/or assignments back to Exxon of various class members' punitive damages claims. One of those class members was Cook Inlet Processors. Rather than give Exxon its sought remittitur, the plaintiffs' committee in the district court excluded certain processors from sharing in the distribution of the punitive damages verdict, despite their class members and those class members' reliance upon promises in the joint prosecution agreement and plan of allocation of a "guaranteed" recovery from the punitive damages proceeds sufficient to satisfy their compensatory damage losses as inducement to "settle" their compensatory damages claims for no cash verdict or additional cash payment in Phase IV, i.e., forego trial and direct recovery of same to expedite judgment on the punitive damages verdict in which they were promised a share. One of the processors so excluded was Cook Inlet Processors.

Should the district court's ruling be permitted to stand, it would constitute a new vehicle through which defendants could attack jury verdicts, particularly in class actions where the distribution phase of the litigation often comes after the actual trial and jury verdict. That is, the district court's ruling would permit any defendant to withhold potential affirmative defenses from the jury and then assert those affirmative defenses, such as release and accord and satisfaction before the trial judge, with no basic due process notice, opportunity to defend, discovery rights, or jury trial rights, during the distribution phase and attempt to prove that a particular individual class member was not

"entitled" to share in the award, notwithstanding the jury verdict. Such a strategy is inconsistent with the purposes of a class action (i.e., once a class action is in fact certified the court has determined that the individual members share common questions and issues of law and fact such that they should be represented by one or more class members who are representative of the class as a whole) and, more important (if it is permissible at all to withhold defenses to a claim from the jury which is determining liability and the amount of damages), at a bare minimum would require a new jury trial to provide such notice and opportunity to defend and for a jury verdict to determine the viability of the defenses that the defendant had decided to hold back from the first jury.

However, in this particular case the unfairness of such situation can obviously be demonstrated as it would permit Exxon, as a matter of trial tactics and strategy to argue to the jury setting the amount of punitive damages (as it did) that Exxon had accepted corporate responsibility and had voluntarily paid out large sums of money while only obtaining "receipts" and not "releases," thereby invoking juror sympathy resulting in a reduced punitive damages award, and then after the fact doing a 180° switch in their position and arguing that those documents were, in reality, releases and/or assignments of damages back to Exxon and that therefore the jury award should be further reduced to reflect the terms of those agreements. Should the district court's ruling be permitted to stand, it would result in a potentially endless series of additional complete jury trials in every class action as to any potential defenses and/or trial strategies that the defendants chose not to assert before the original jury and assert for the first time during the distribution phase.

In this case, however, there was not even a subsequent proceeding with minimal due process rights afforded to Cook Inlet during which the legal viability of Exxon's late-asserted defenses were determined, as both the plaintiffs' committee, the district court and the Ninth Circuit Court of Appeals took the "release" documents at face value and did not provided Cook Inlet Processors with its due process and/or jury trial rights regarding the legal viability of or enforceability of those documents and the defenses available to Cook Inlet, such as coercion, economic duress, reliance and fraud in the inducement. Thus, at the very minimum, Cook Inlet Processors is entitled to a remand of this case to determine the viability of the documents that were used to exclude Cook Inlet Processors from sharing in the punitive damages verdict; however, as explained further herein, as the jury has already rendered its verdict that each member of the mandatory punitive damages class is entitled to punitive damages from Exxon and the purported affirmative defenses were not properly pled or adjudicated, procedurally or substantively, the existence or viability of any defenses that Exxon claims to that punitive damages award is no longer viable or relevant as a matter of law due to the substantive and procedural requirements of pleading affirmative defenses, and the doctrines of res judicata, finality of judgment and the provisions of the Seventh Amendment to the Constitution of the United States of America.

## B. THE UNDERLYING ACTION

This case arises from the oil spill from the vessel Exxon Valdez in 1989 and its devastating impact upon the fishing industry in Prince William Sound, Alaska. Numerous actions were filed in State and Federal Court, and were consolidated in the United States District Court for the

District of Alaska. The District Court had jurisdiction pursuant to 28 U.S.C. §1333.

The United States District Court certified a "mandatory punitive damages class" pursuant to Federal Rule of Civil Procedure 23. (App. 44-49). The class included Cook Inlet Processors. The jury returned a punitive damages verdict in favor of the members of the punitive damages class, of $5 billion dollars, upon which a judgment was entered. (App. 42).

Pursuant to the jury verdict, the plaintiffs' committee formed a "plan of allocation" for distribution of the punitive damage proceeds to, among others, the "seafood processor category." (App. 62-99.) It is undisputed that the plan of allocation included Cook Inlet Processors. To expedite the proceedings regarding the $5 billion punitive damages award, the plaintiffs' committee suggested a settlement whereby the claimants would dismiss their compensatory damages claims, to be tried in "Phase IV," in exchange for no additional settlement funds. (App. 62-99.)

Based upon its inclusion in the punitive damages class, its status as a signatory to the joint prosecution agreement, and its inclusion in the plan of allocation, and the Phase IV settlement agreement's "guarantee" of payments from the proceeds of the punitive damages verdict sufficient to remedy its compensatory damages losses, Cook Inlet Processors did not object to the settlement of the compensatory damages phase of the trial for no further money payment from Exxon in order to speed the process of the distribution of the proceeds from the punitive damages judgment and punitive damages verdict. The settlement of the Phase IV compensatory damages claims was approved. As stated by the plaintiffs' committee, the claimants'

motivation behind accepting no additional money for their compensatory damages in the Phase IV settlement was a guaranteed participation in the punitive damages distribution sufficient to compensate for compensatory losses. (App. 75). In reliance on its inclusion, and the "guarantee," Cook Inlet gave up its compensatory damages claims against Exxon and agreed to the settlement.

After the jury verdict, and after the time period to object to the Phase IV settlement and plan of allocation, and despite its representations to the punitive damages jury that it had accepted corporate responsibility by paying out millions of dollars and only obtained receipts (and not releases or assignments) in return, Exxon raised, for the first time, numerous documents which it contended constituted "releases" and/or assignments of some class member's (including Cook Inlet) punitive damages claims, and that, thus, according to Exxon, it was entitled to an offset against the jury verdict. It is undisputed that Exxon never raised these documents to the jury in the context of affirmative defenses of either release, assignment or accord and satisfaction.

Based upon the terms of two of these documents, and without affording basic due process or jury trial rights, the plaintiffs' committee, and later, the district court, disregarded the finality of the jury verdict, established notions of res judicata and Cook Inlet and Nautilus' constitutional rights, class status and reliance, and excluded Cook Inlet and Nautilus Marine from the distribution of the "punitive damages funds."

This case is of importance not only to the individual parties involved, but also to the judiciary as a whole. If permitted to stand, the District Court's decision prohibiting

plaintiffs from receiving damages that were awarded to them by the jury based upon untried, unasserted, and abandoned theories of defense that was raised for the first time after the jury verdict affects the finality of every jury verdict and judgment rendered in federal court, and eviscerates the requirements and standards encompassed in Federal Rule of Civil Procedure 50. The holding permits a defendant to withhold evidence of an alleged defense from the jury, and to attack the verdict during subsequent proceedings using those affirmative defenses.

Thus, this case raises an issue of exceptional importance, i.e., does a district court have the authority to violate the Seventh Amendment and disregard a jury verdict based upon evidence that was never admitted, and a legal theory that was never asserted before the jury?

The decision denying Cook Inlet its due process rights to receive at a minimum its compensatory damages via participation in the punitive damages as "guaranteed" by the joint prosecution agreement (and further "guaranteed" by the Plaintiffs' Committee as to the plan of allocation and the Court's orders approving same) as to which it was a signatory and detrimentally relied in foregoing its own rights to litigate its amount of compensatory damages in the Phase IV (compensatory damages) proceedings presents grave threats and issues to any litigant's due process rights to rely upon such joint prosecution agreements, court orders and jury verdicts in complex or class action litigation.

C. THE ERRONEOUS NINTH CIRCUIT OPINION.

The Ninth Circuit's Cook Inlet and Nautilus Marine opinions ignored the underlying infirmity of both the plaintiffs' committee's and the district court's procedural and

substantive posture in considering Exxon's "defense(s)," after the jury's finding, verdict and judgment based upon the admitted evidence, that Nautilus and Cook Inlet were entitled to punitive damages as members of the mandatory punitive damages class. The jury finding is conclusive as to all claims and defenses that could have been raised.[1]

This error was compounded by the Ninth Circuit's holding that Nautilus and Cook Inlet's defenses to the viability of Exxon's waived affirmative defense fail as, allegedly, Nautilus and Cook Inlet "presented no evidence to support setting aside the release on the basis of economic duress." No such evidence was presented to the jury as Exxon never offered the documents in the first instance. Rather, in an attempt to convince the punitive damages jury Exxon had accepted corporate responsibility, Exxon's president testified that it had only obtained "receipts" for the payments it had made. Therefore, evidence of Cook Inlet's defenses to the abandoned, affirmative defenses of Exxon were irrelevant to the issues before the jury.

The Ninth Circuit also ignored the existence of the mandatory punitive damages class when it found that: "Exxon did not waive the releases by failing to plead them as affirmative defenses because the complaints did not request punitive damages." [sic] Even if such a statement were true (which, as argued by Cook Inlet, it is not) this contradicts the Ninth Circuit panel's direct holding in a companion appeal

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[1] See Cromwell v. County of Sac, 94 U.S. 351 (1876) (a judgment is conclusive as to the claim or controversy); Seventh Amendment to the United States Constitution ("[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.").

as to a somewhat similarly situated class member, who was allowed on appeal (by reversal of Judge Holland's order) to share in the punitive damages proceeds. That is, as the Ninth Circuit found in the related case of Sea Hawk Seafoods, Inc., et al, and Western Alaska Fisheries Inc., v. Exxon Corp and Discovery Master, No. 99-35878 (App. 27-30), the allegations in the complaint are irrelevant given the Court's certification of the mandatory punitive damages class. Indeed, the Western Alaska panel properly found that no complaint at all need have been filed to entitle members of the class to share in the distribution of the proceeds of a verdict awarded to the mandatory punitive damages class.

## X. REASONS FOR GRANTING CERTIORARI.

### A. THE NINTH CIRCUIT AND THE DISTRICT COURT, IN APPROVING A PLAN OF DISTRIBUTION WHICH DIVESTS A CLASS MEMBER OF DAMAGES TO WHICH A JURY HAS DETERMINED IT ENTITLED, BASED UPON AN UNTRIED AFFIRMATIVE "DEFENSE" IS IN CLEAR DEROGATION OF THE DOCTRINE OF RES JUDICATA AND THE REQUIREMENTS OF THE SEVENTH AMENDMENT AND FEDERAL RULE OF CIVIL PROCEDURE 50 AND THIS CONSTITUTES SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

The laws regarding the finality of a judgment as to claims and defenses has been established for well over a hundred years. In Cromwell v. County of Sac, 94 U.S. 351 (1876), this Court stated that:

> [A judgment] is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

Id. at 352-353, (emphasis added).

Indeed, the Seventh Amendment to the United States Constitution provides that: "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." No such provisions have been involved in this case which would permit the usurpation of the jury's authority.

The principle of finality has been cited more recently by this court in Nevada v. United States, 463 U.S. 110 (1983) when the Court cautioned that:

> [W]hat we said with respect to this doctrine more than eighty years ago is still true today; it ensures "the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if...conclusiveness did not attend the judgments of such tribunals."

Id. at 129 (quoting Southern Pacific Railroad v. United States, 168 U.S. 1 (1897) (emphasis added).

Once the jury decided that the members of the mandatory punitive damages class (as to which Cook Inlet was a member[2]) were entitled to punitive damages, that finding

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[2] In Exxon had intended to rely on the "release" or "assignment" then the matters should have been raised as affirmative defenses to the claims of the class, or in the context of an objection to class certification. Exxon chose

became final. The subsequent allegation of the existence of a "defense" of release "is of no legal consequence." Cromwell at 352. The jury verdict "is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed." Cromwell at 352-353. The judge could only deviate from the jury verdict by entering a judgment notwithstanding the verdict. (See Federal Rule of Civil Procedure 50). No such motion was made, nor did the evidence actually presented during the trial support such a motion (as would have been required to grant a JNOV, Id.), as Exxon made the strategic decision not to attempt to rely upon the terms of the documents or present evidence of them to the jury and, instead, sought to invoke juror sympathy and attempted to demonstrate corporate responsibility by testifying that it paid out the money, and only obtained receipts, not releases, in return.

Clearly, it did not wish to assert the required affirmative defenses since it did not want the jury to know of the facts that Cook Inlet was prepared to introduce to show duress, coercion and fraud in the manner in which Exxon obtained such "releases."

Thus, even though the jury awarded it punitive damages, Cook Inlet has been divested of that jury verdict without due

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not to do so, as a tactic to create sympathy, and avoid the jury learning of its fraud and coercion, which would have been presented to the punitive damages jury by Cook Inlet in response to such affirmative defenses. Moreover, it is essential to note that Exxon did not assert the terms of the documents as a defense to Cook Inlet's claims or inclusion in the mandatory punitive damages class, rather, they are being relied upon by Cook Inlet's co-plaintiffs in an attempt to exclude Cook Inlet from sharing in the damages award.

process of law, in violation of the Fifth and Seventh Amendments to the United States Constitution, the Federal Rules of Civil Procedure, and hundreds of years of established precedent. Such a disregard is a drastic departure from established standards, and calls for the exercise of the supervisory power of this Court.

B. THIS DIVESTITURE HAS OCCURRED DESPITE NOT ONLY THE DISTRICT COURT'S CLEAR INTRUSION INTO THE PROVINCE OF THE JURY, BUT ALSO DESPITE DETRIMENTAL RELIANCE BY COOK INLET ON NUMEROUS REPRESENTATIONS AND COURT ORDERS OF RECORD, INCLUDING THE JOINT PROSECUTION AGREEMENT, THE PLAN OF ALLOCATION AND THE COURT'S APPROVAL OF SAME, AND THE PHASE IV SETTLEMENT AND THE COURT'S APPROVAL OF SAME

Cook Inlet was repeatedly promised and guaranteed that it would receive at least its compensatory damage losses, from sharing in the punitive damages verdict, and detrimentally relied on same to forgo its right to seek certain individual compensatory damages (which were never the subject of a purported "release") in Phase IV, by agreeing to a Phase IV settlement for no additional money to expedite the punitive damages verdict judgment and receipt of said proceeds.

Cook Inlet Processors has been denied a jury verdict worth millions of dollars by the eleventh-hour summary resurrection of the alleged releases [via utilizing a narrow, one sided, and biased "literal" interpretation of the language of the documents without any due process opportunity for the plaintiffs to develop, or consideration by the Plaintiffs' Committee or court of the factual circumstances (fraud,

duress, coercion) in which they were obtained], contrary to the Seventh Amendment, established Ninth Circuit authority,[3] the Rules of Civil Procedure concerning the conclusive effect of a jury verdict and judgment, the necessity of pleading and litigating affirmative defenses to class claims for punitive damages, Exxon's trial strategy and testimony which estops them from belatedly asserting a claim of release, and basic doctrines of res judicata, i.e., that the jury verdict is conclusive there were no such defenses of "release" and/or "assignment" or "accord and satisfaction" to the Plaintiffs' compensatory and punitive damages claims.

As a result of this "after the fact" summary divestiture of a jury award, neither Cook Inlet nor Nautilus (unlike the other processors included in the plan of allocation and distribution) are receiving even a significant portion of their actual compensatory damages as contemplated and promised by the Phase IV agreements, the plan of allocation and the joint prosecution agreements which they had a contractual right to rely upon and did rely upon[4].

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[3]. Kern Oil & Refining Co. v. Tenneco Oil Co., 840 F.2d 730 (CA9 1988).

[4]. It should be noted that, in the Plaintiffs' Committee's Memorandum in Support of Preliminary Approval and Authorizing Notice regarding the Phase IV settlement, the Committee indicated that a motivating factor in accepting the token Phase IV "settlement" was a trade of the uncertainties of litigation for "a guaranteed participation in the punitive and compensatory damage awards if they are sustained on appeal." (App. 69). The Plaintiffs' Committee also acknowledged that the distribution of those funds (punitive damages proceeds) would be predicated not upon the individual merits or circumstances of any particular plaintiff, but upon the terms of the joint prosecution agreement. (App.

That is, it was an integral, contractual understanding and agreement of said plan of allocation, Phase IV agreement and Joint Prosecution agreement that the punitive damages proceeds, by virtue of either judgment or settlement would be utilized to ensure the plaintiffs at least received their compensatory damages and any excess would then be distributed pro rata according to said compensatory damages as adjusted by risk factors;[5]

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70.) Such a position was also consistent with the Ninth Circuit's holding in the related Western Alaska case. Thus, every claimant was to receive its stipulated compensatory damages from the punitive damages verdict, i.e. punitive damage monies via judgment and/or settlement proceeds. The plaintiffs' committee and the district court have now, however, made a drastic departure from established procedure and resurrected a long since abandoned and dead affirmative defense of another party and summarily used it to prevent Cook Inlet from sharing in the award the jury determined it was entitled to.

[5]. Note that total compensatory damages of all class members were at least $2.5 billion, and the compensatory jury award and phase IV agreements were obviously woefully inadequate to compensate such plaintiffs. Thus, it was agreed to utilize, under the joint prosecution agreement, such an allocation/distribution mechanism to initially ensure that all class members at least received their compensatory damages from the punitive damages award. The eleventh-hour exclusion of Cook Inlet and Nautilus Marine means they are now denied 99% ($20,609,822) of same under the plan, or, at a minimum, 76% ($15,764,043) even if the funds paid at the time of the documents is considered as a set off. This functional dismissal of Nautilus and Cook Inlet's claims has occurred despite the fact that, after the $2.5 billion is

Cook Inlet's and Nautilus' compensatory damages, as agreed by the Plaintiffs' Committee were at least $11,846,900 and $8,953,289, respectively. Accordingly, as noted even if the sums initially accepted by them in circumstances constituting coercion, duress and fraud[6] are

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distributed from the over $5 billion in the fund, the remaining $2.5 billion will be distributed pro rata. Thus, even given the processor plans 50% discount, upon distribution of the remaining fund, even the processors that have no claim at all under the district court's Robbins Dry Dock rulings will most likely receive full compensatory damages recovery, whereas Nautilus and Cook Inlet are set to receive about 1% of their stipulated compensatory damages.

[6]. Note that the Alaska cases of Northern Fabrication Company, Inc., v. Unocal, 980 P.2d 958 (Alaska 1999) and Zeilinger v. Sohio Alaska Petroleum Company, 823 P.2d 653 (Alaska 1992) (discussed at oral argument before the Ninth Circuit) discuss the narrow issue of what constitutes coercion (unlike the instant case) where there are full due process rights to litigate the issue (after proper notice and discovery) and the releasor (Exxon) has not affirmatively induced coercive circumstances via fraud and refusal to pay an obvious debt, are not dispositive or even relevant on this issue since the facts herein to support fraud, coercion and duress were not developed due to the basic denial of the right to litigate these issues through the required affirmative defense route via formal discovery and jury trial. However, if given the opportunity, and had Exxon attempted to rely on said documents, the appellants were prepared to present evidence to show that Exxon induced Nautilus and Cook Inlet to undertake certain debts involving payment of lost wages and the like, which Exxon was to indemnify, but then

viewed as a set off as pled by Exxon and as alleged in their trial testimony, even assuming a 50% processor "discount" applies, and the Alyeska settlement funds are discounted, there still remains the sums of $1,924,428 and $2,115,105.50, respectively, as uncompensated compensatory damages[7] from the first $2.5 billion of punitive proceeds "guaranteed" to Nautilus and Cook Inlet by the Phase IV settlement agreement, and $5,923,450 and

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payment for which was unilaterally conditioned on the execution of the release and/or assignment documents. Thus, this case is in accord with Totem Marine v. Alyeska Pipeline Service Company, 584 P.2d 15 (Alaska 1978), and contains the "wrongful conduct" element missing from both Northern Fabrication Company, Inc., v. Unocal, 980 P.2d 958 (Alaska 1999) and Zeilinger v. Sohio Alaska Petroleum Company, 823 P.2d 653 (Alaska 1992). However, it cannot be stressed enough that the proceedings before the Ninth Circuit and the District Court were not based upon a proper pre-trial summary judgment motion or post verdict Rule 50 motion for judgment notwithstanding the verdict brought by Exxon, the entity with the burden of proof for its own affirmative defenses. Rather, the decision before this Court is the summary dismissal of a huge portion of the Appellant's claims without any pretense of due process. In fact, neither the Plaintiffs' Committee or the District Court ruled on the coercion/duress/fraud issue, as Exxon never properly raised the documents.

[7] Note further that most of these compensatory damages were post-1989/1990; the relevant period at trial as to compensatory and punitive damages was 1989-1995 and neither the Cook Inlet nor Nautilus Marine purported releases could be read to release either post-1989/1990 compensatory damages nor punitive damages for conduct after the date of the documents.

$4,476,644.50, respectively, of uncompensated compensatory damages from the "excess," all of which have been summarily denied Nautilus and Cook Inlet with no specific fact finding or trial by the plaintiffs' committee, district court, or jury and due process rights. Significantly, Nautilus Marine had substantial direct action compensatory and punitive damage claims for Exxon's post 1989/1990 conduct relating to the non-permissive "capture" of Nautilus Marine's dock in the post 1989 spill clean up efforts and resulting devastation to their business. Cook Inlet had similar claims. As to both Cook Inlet and Nautilus Marine, said claims and damages cannot, under any scenario, be said to have been "released" via the 1990 documents, and which they compromised in the Phase IV/Joint Prosecution Agreements/Plan of Allocation agreements in reliance on the "guarantee[8]" of the Committee that they would receive same from the "punitive" damages proceeds. Accordingly, the court must recognize that the basic rights denied, with no semblance of due process or appropriate discovery or procedure (or even factual finding regarding coercion, fraud or duress) was the right to at least obtain compensatory damages from the total proceeds as promised.

Moreover, the punitive damages jury verdict to the class was based upon all of the class plaintiffs' injuries, including Cook Inlet and Nautilus, and thus, as conceded by Exxon it would be unfair to grant a "windfall" to the other plaintiffs by forfeiting Cook Inlet and Nautilus' pro-rata share and allocating those proceeds to the other processors or plaintiffs[9]. At the time of the jury award of punitive

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[8]. See App. 69.

[9]. This is especially true when one realizes the use of these "punitive" proceeds, via either settlement or judgment, were an integral part of the Joint Prosecution

damages to the mandatory punitive damages class, both Nautilus and Cook Inlet were members of that class and signatories to the joint prosecution agreement. Thus, Nautilus and Cook Inlet's damages, and Exxon's deliberate actions undertaken with deliberate disregard of Nautilus' and Cook Inlet's rights formed part of the basis for the punitive damages award. Moreover, Exxon, by virtue of res judicata and the failure to litigate the affirmative defenses or release or accord and satisfaction, can no longer claim a defense or reduction as to the punitive damages. The proceeds, by virtue of the verdict, the Phase IV Settlement, the Joint Prosecution Agreements and the Plan of Allocation, were an award properly allocated to Nautilus and Cook Inlet, and so adjudged. The eleventh hour summary resurrection of the "release" cannot "shift" payments that were set aside for Nautilus and Cook Inlet to the other plaintiffs. To do so divests Cook Inlet and Nautilus Marine of the jury verdict finding them entitled to punitive damages and violates the common law, the Rules of Civil Procedure and the United States Constitution. The Court's actions were equivalent to a judgment notwithstanding the verdict without a proper motion and based upon "evidence" that was never admitted. Such a departure from procedural and substantive norms calls for the exercise of this Court's supervisory powers.

It must be emphasized that, as Exxon made the strategic decision not to assert the terms of the alleged "release" (a decision that benefited all plaintiffs in that the

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Agreement/Plan of Allocation/Phase IV compensatory damages compromise promise to class members of "certain" and "definite" and "guaranteed" (See App. 69) compensation for their compensatory damages and Cook Inlet's and Nautilus' reliance on same in their agreement to the Phase IV Settlement and Plan of Allocation.

particular facts of Nautilus and Cook Inlet's cases were then relied upon by the jury in setting the $5 billion punitive damages amount), as conceded by Mr. Jamin to the district court, the plaintiffs' committee never afforded any consideration or opportunity for adjudication to Cook Inlet or Nautilus Marine as to the evidence of fraud, duress or coercion.[10] Moreover, Cook Inlet made numerous and

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[10]. Mr. Jamin Stated that:

> Mr. Weidner also tells us this thing is no good. It's entered into on the basis of duress or fraud or whatever. We don't think we are the right group to present that to. If Mr. Weidner wants to present an action in this court or in state court, wherever it's appropriate, that's fine, but we don't want to be judge or jury or executioner. We simply want to follow the orders of the court.
>
> ...
>
> ...But if, Your Honor, we are right that when you assign back the right, it's extinguished; then there is nothing to play games with. And we think indeed that was a great deal of what was involved with the Court when the Court said no to the Seattle 7 agreement.
>
> Your Honor, I'd like to argue that it's more complicated than that, but that's what motivated us to make our decisions. And if we are wrong, then tell us we are wrong. But on type one we think we followed the rules of the Court as to who was a claimant in this litigation, who had a compensatory damage claim, and by virtue of that, who had a right to present a punitive damages claim.

> As to type two, we looked at the releases and we acted on those releases based upon their language. We didn't feel it was our responsibility or obligation to look at issues involving fraud or otherwise, nor do we think this is the right forum to make those decisions.
>
> ...
>
> ...In fact, we did that consistent with positions we had taken with you and which you noted in both 317 and 327 in footnotes. You said these guys are telling me they are not going to give punitive damages if there is a release. And we are not going to stand here today and tell you to the contrary.
>
> We think the original orders involving the Seattle 7 were correct and they [sic] need to be the same sort of orders here today. Thank you.

(Emphasis added.)

Thus, Cook Inlet's co-plaintiffs, seeing a chance to obtain a larger share of the damages "pie" for themselves, sought to exclude the "Seattle Seven" processors from sharing in the distribution by using a policy argument that due to those processor's assignments back to Exxon, they should be excluded as Exxon should not share in the recovery of punitive damages against itself. The District Court initially so ruled, but was reversed in the Icicle Seafoods, Inc. et al and Exxon Shipping Company, et al. v. Grant Baker et al., No. 96-36038; Icicle Seafoods Inc., et al. v. Alaska Sportfishing Assoc. Inc. et al., No. 97-35036; and Icicle Seafoods, Inc. et al. v. Grant Baker et al. v. Exxon Shipping Company, et al., No. 97-35190 (the "Seattle Seven Opinions"). In an attempt to protect this position prior to the

vigorous requests to both the plaintiffs' committee and the Court for all due process rights in that regard, including discovery and jury trial. Finally, it stands basic rules of pleading and procedure on their head to claim that it was incumbent on Cook Inlet to file a declaratory judgment action as to the invalidity of the releases/assignments, when such documents were not raised as required as affirmative defenses in light of the Nautilus and Cook Inlet direct action suits against Exxon.[11] The burden of raising the issues for litigation before the jury (if they chose to do so as opposed to the self serving trial strategy and testimony actually offered by Exxon) was on Exxon via mandatory affirmative defenses.

C. THE NINTH CIRCUIT'S AND THE DISTRICT COURT'S HOLDING REGARDING COOK INLET IS ALSO IN DIRECT CONTRADICTION TO THE NINTH CIRCUIT'S DECISION IN ICICLE SEAFOODS, INC. ET AL AND EXXON SHIPPING COMPANY, ET AL. V. GRANT BAKER ET AL., NO. 96-36038; ICICLE SEAFOODS INC., ET AL. V. ALASKA SPORTFISHING

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Ninth Circuit reversal, the plaintiffs' committee and district court also excluded Cook Inlet and Nautilus, even though neither Cook Inlet nor Nautilus had assigned any claims to Exxon.

[11]. Indeed, requiring a plaintiff to litigate, through summary judgment motions or declaratory judgment actions, the validity and application of all potential affirmative defenses, especially when those defenses are not being asserted by the defendant, would vastly increase the already extensive burden on the trial courts, would result in a log jam of advisory proceedings, and would shift the burden of proof, requiring the Plaintiff to disprove every potential defense, regardless of the lack of merit or procedural bars.

ASSOC. INC. ET AL., NO. 97-35036; AND ICICLE SEAFOODS, INC. ET AL. V. GRANT BAKER ET AL. V. EXXON SHIPPING COMPANY, ET AL., NO. 97-35190 (THE "SEATTLE SEVEN OPINIONS").

The Ninth Circuit in Icicle Seafoods, Inc. et al and Exxon Shipping Company, et al. v. Grant Baker et al., No. 96-36038; Icicle Seafoods Inc., et al. v. Alaska Sportfishing Assoc. Inc. et al., No. 97-35036; and Icicle Seafoods, Inc. et al. v. Grant Baker et al. v. Exxon Shipping Company, et al., No. 97-35190 (the "Seattle Seven Opinions") reversed the lower court and held that the agreements entered into by seven fish processors based in Seattle (the "Seattle Seven") to cede back their share of punitive damages to Exxon were enforceable agreements and that the Seattle Seven could not be excluded from the plan of distribution based upon those agreements. Id.

The Plaintiffs' Committee, had moved to exclude the "Seattle Seven" from sharing in the distribution of the proceeds based upon an argument that, due to the alleged assignments of those processors' rights to punitive damages back to Exxon, that Exxon should not be able to share in an award of punitive damages against itself. The District Court agreed. To protect their position as to the Seattle Seven, as evidenced by Mr. Jamin's statements (see footnote 10) the Plaintiffs' Committee also excluded Cook Inlet and Nautilus, even though no such assignment to Exxon existed. The court likewise excluded Cook Inlet and Nautilus to protect its erroneous ruling as to the "Seattle Seven." The Ninth Circuit reversed the "Seattle Seven orders," finding an abuse of discretion.

Cook Inlet is in an even stronger position than the Seattle Seven since it actually sued Exxon via a direct action,

never agreed to a cede back provision, and its inclusion in the mandatory punitive damages class, coupled with the absence of a timely suit by Exxon within the statute of limitations for an alleged breach of the agreements or timely raising of the affirmative defenses concerning the alleged releases/assignments and purported breach of same, means that there is a total bar to the use of the disputed documents to deny Cook Inlet and Nautilus Marine recovery. The plaintiffs' committee has no standing to now try to raise the issue, repudiate the vested rights under the Joint Prosecution Agreements, the Phase IV Settlement or the Plan of Allocation, and, most importantly, the jury verdict and the Seventh Amendment, and benefit their own clients by discriminating against Nautilus and Cook Inlet. The district court's and the Ninth Circuit's affirmation of the plaintiffs' committee plan is a gross deviation from established practice.

The real impetus behind the plaintiffs' committee's eleventh hour discrimination (as evidenced by Mr. Jamin's statements set forth above in footnote 10) was to protect their (and the district court's) position as to the Seattle Seven settlements (excluding the Seattle Seven from sharing in the distribution). Said position was subsequently reversed as an abuse of discretion by the Ninth Circuit.

Just as the Ninth Circuit recognized in its Icicle Seafoods/Seattle Seven ruling, the District Court's legal errors concerning the cede back arrangement and the denial of participation in the plan of allocation/distribution was an abuse of discretion, so here the legal errors committed as to allowing the eleventh hour resurrection of purported releases/assignments (by the Plaintiffs' Committee, who had no standing to do so) that were procedurally, substantively, equitably, contractually (under the joint prosecution

agreement) and as a matter of basic due process, res judicata and constitutional law, barred, constitutes grounds for reversal.

## XI. SUMMARY AND CONCLUSION.

The rulings of the Ninth Circuit and the District Court depart dramatically and arbitrarily from the accepted and usual course of judicial proceedings. The jury found that Cook Inlet was entitled to punitive damages. The district court overturned that verdict and the judgment entered pursuant to that verdict and took away Cook Inlet's rights as a member of the mandatory punitive damages class to share in proceeds from the punitive damages verdict at the eleventh hour on the basis of affirmative defense(s) which were not properly pled to or considered by the jury, and were based on evidence not before the jury. In engaging in this unprecedented divestiture and departure from established procedure in violation of years of precedent, emasculating Cook Inlet's substantive and procedural rights and the express terms of the Seventh Amendment to the Constitution of the United States, the district court afforded no due process rights, no rights to a jury trail, and admittedly relied upon the recommendation of a plaintiffs' committee that refused to hear Cook Inlet's arguments regarding the merits of those documents relied upon. Thus, this divestiture, which was unconstitutional in itself, was carried out without any semblance of Constitutionally required due process or jury trial. Finally, this divestiture was based upon "evidence" which was never admitted, a legal theory never asserted, and factual issues that were never tried.

Such procedure destroys the integrity of the basic principles and procedures of a mandatory class action, and precludes any class member from relying on same, so as to

jeopardize the very basis of Federal Rule of Civil Procedure 23 class action litigation, the finality of judgments and the Seventh Amendment right to a jury trial.

This Court should exercise its supervisory power, grant certiorari and reverse and remand on the merits.

Respectfully submitted this 24th day of April, 2001.

Phillip Paul Weidner
Counsel for Petitioner

(2) Supreme Court, U.S.
FILED

No. 001664 APR 26 2001

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

COOK INLET PROCESSORS, INC.,
Petitioner,

GRANT BAKER, as class representatives of the Mandatory Punitive Damages class; and all persons similarly situated; et al.
Respondants; and

EXXON CORP., aka Exxon Mobil Company; Captain JOSEPH HAZELWOOD; EXXON SHIPPING CO.,
Respondants.

# ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| In re: THE EXXON VALDEZ | No. 99-35864 |
| COOK INLET PROCESSORS, INC., | DC# CV-89-00095-HRH |
| Plaintiff-Appellant, | MEMORANDUM[1] |
| GRANT BAKER, as class representatives of the Mandatory Punitive Damages class; and all persons similarly situated; ALASKA SPORT FISHING ASSOCIATION; LOUIS E. ALBER, AHMET ARTUNER; JEFFREY BAILEY; WILLIAM BENNETT; MICHAEL WAYNE BULLOCK, ROBYNE L. BUTLER; ALBERT RAY CARROLL; DEBRA LEE, INC.; DEW DROP, INC.; LARRY L. DOOLEY, MARK DOUMIT; STEVE DOUMIT; DOUGLAS R. JENSEN; DENNIS G. JOHNSON; DONALD P. KOMPKOFF, Sr.; JOSEPH KOPECKY; DANIEL | |

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit as may be provided by 9th Cir. R. 36-3.

LOWELL; ANDREAN E. MARTUSHEFF; CAROL ANN MAXWELL; JACQUELAN JILL MAXWELL; ROBERT A. MAXWELL, Sr.; MICHAEL McLENAGHAN; ELENORE E. McMULLEN; LESLIE R. MEREDITH; NATIVE VILLAGE OF TATITLEK; LEONARD S. OGLE; STEVEN T. OLSEN; AUGUST M. PEDERSEN, Jr.; MARY LOU REDMOND; JOSEPH DAVID STANTON; JEAN A. TISDALL; DARRELL WOOD,

Plaintiffs-Appellees,

and

EXXON CORP., aka Exxon Mobil Company; Captain JOSEPH HAZELWOOD; EXXON SHIPPING CO.,

Defendants-Appellees.

---

NAUTILUS MARINE ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

GRANT BAKER, et al., as class representatives of the Mandatory Punitive Damages class; and all persons similarly situated; ALASKA SPORT FISHING ASSOCIATION; LOUIE E. ALBER; AHMET

No. 99-35866

DC# CV-89-00095-HRH

ARTUNER; JEFFREY BAILEY; WILLIAM BENNETT; MICHAEL WAYNE BULLOCK; ROBYNE L. BUTLER; ALBERT RAY CARROLL; DEBRA LEE, INC.; DEW DROP, INC.; LARRY L. DOOLEY, MARK DOUMIT; STEVE DOUMIT; DOUGLAS R. JENSEN; DENNIS G. JOHNSON; DONALD P. KOMPKOFF, Sr.; JOSEPH KOPECKY; DANIEL LOWELL; ANDREAN E. MARTUSHEFF; CAROL ANN MAXWELL; JACQUELAN JILL MAXWELL; ROBERT A. MAXWELL, Sr.; MICHAEL McLENAGHAN; ELENORE E. McMULLEN; LESLIE R. MEREDITH; NATIVE VILLAGE OF TATITLEK; LEONARD S. OGLE; STEVEN T. OLSEN; AUGUST M. PEDERSEN, Jr.; MARY LOU REDMOND; JOSEPH DAVID STANTON; JEAN A. TISDALL; DARRELL WOOD,

Plaintiffs-Appellees,

and

EXXON CORP., aka Exxon Mobil Corporation; EXXON SHIPPING CO.; JOSEPH HAZELWOOD, Captain,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief District Judge, Presiding

Argued and Submitted November 9, 2000
San Francisco, California

BEFORE: SCHROEDER Chief Judge, BROWNING and KLEINFELD, Circuit Judges.

Cook Inlet Processors and Nautilus Marine Enterprises appeal the district court's approval of a seafood processor plan of distribution, which excluded them from recovering a portion of the $5 billion punitive damage verdict against Exxon for the Valdez oil spill. The plan excluded the processors on the basis of settlement agreements they both signed, which contained full punitive damage releases. We review the district court's approval of a plan of distribution for an abuse of discretion, In re Exxon Valdez, 229 F.3d 790, 795 (9th Cir. 2000), and we affirm.

Cook Inlet's settlement agreement released Exxon from "all punitive damage claims of any kind arising at any time." Similarly, Nautilus Marine's settlement agreement released Exxon from "any and all claims for punitive damages in any way associated with [the Valdez spill]." The district court did not abuse its discretion when it approved the plan which excluded the processors from punitive damage recovery based on the release language.

The processors' arguments for invalidating the releases on the grounds of economic duress and waiver also fail. The processors presented no evidence to support setting aside the releases on the basis of economic duress. Exxon did not waive the releases by failing to plead them as affirmative defenses because the complaints did not request punitive damages.[2]

AFFIRMED.

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[2] Cook Inlet's and Nautilus Marine's remaining contentions are rejected as meritless.

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

In Re:
THE EXXON VALDEZ

ICICLE SEAFOODS, INC.; SEVEN SEAS CORPORATION; OCEAN BEAUTY SEAFOODS, INC.; OCEAN BEAUTY ALASKA, INC.; WARDS COVE PACKING COMPANY, INC.; ALASKA BOAT COMPANY; NORTH PACIFIC PROCESSORS; TRIDENT SEAFOODS CORPORATION; NORTH COAST

No. 96-36038

SEAFOOD PROCESSORS, INC.; ADF, INC., dba Aleutian Dragon

D.C. No.
CV-89-00095-
HRH

Fisheries,
Plaintiffs-Appellants,

and

EXXON SHIPPING COMPANY; EXXON CORPORATION,
Defendants-Appellants,

v.

GRANT BAKER, et al., as representatives of the Mandatory Punitive Damages Class,
Plaintiffs-Appellees.

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ICICLE SEAFOODS, INC.; PETER PAN SEAFOODS, INC.; SEVEN SEAS

CORPORATION; STELLAR SEAFOODS, INC.; OCEAN BEAUTY SEAFOODS, INC.; OCEAN BEAUTY ALASKA, INC.; WARDS COVE PACKING COMPANY, INC.; ALASKA BOAT COMPANY; NORTH PACIFIC PROCESSORS; ADF, INC.; dba Aleutian Dragon Fisheries; TRIDENT SEAFOODS CORPORATION; NORTH COAST SEAFOOD PROCESSORS, INC.,
Plaintiffs-Appellants,

v.

ALASKA SPORTFISHING ASSOC., INC.;

LOUIE E. ALBER; AHMET ARTUNER;

GRANT C. BAKER; JEFFREY BAILEY;

WILLIAM BENNETT; MICHAEL WAYNE BULLOCK; ROBYNE L. BUTLER; ALBERT RAY CARROLL; DEBRA LEE, INC.; DEW DROP, INC.; LARRY L. DOOLEY; MARK DOUMIT; STEVE DOUMIT; DOUGLAS R. JENSEN; DENNIS G. JOHNSON; DONALD R. KOMKOFF, SR.; JOSEF KOPECKY; DANIEL LOWELL; ANDREW E. MARTUSHEFF; CAROL ANN MAXWELL; JACQUELAN JILL MAXWELL; ROBERT A. MAXWELL, SR.; MICHAEL MCLENAGHAN; ELENORE E. MCMULLEN; LESLIE R. MEREDITH; THE NATIVE VILLAGE OF TATITLEK; LEONARD S. OGLE;

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STEVEN T. OLSEN; AUGUST M. PEDERSON, JR.; MARY LOU

No. 97-35036

D.C. No.

CV-96-00056-HRH

REDMOND; JOSEPH DAVID STANTON; JEAN A. TISDALL; DARRELL WOOD, Defendants-Appellees.

In Re:
THE EXXON VALDEZ

ICICLE SEAFOODS, INC.; PETER PAN SEAFOODS, INC.; SEVEN SEAS CORPORATION; STELLAR SEAFOODS, INC.; OCEAN BEAUTY SEAFOODS, INC.; OCEAN BEAUTY ALASKA, INC.; WARDS COVE PACKING COMPANY, INC.; ALASKA BOAT COMPANY; NORTH PACIFIC PROCESSORS; ADF, INC., dba Aleutian Dragon Fisheries; TRIDENT SEAFOODS CORPORATION; NORTH COAST SEAFOOD PROCESSORS, INC.,

Plaintiffs-Appellants.

v.

GRANT BAKER, et al., as representatives of the Mandatory Punitive Damages Class,
Plaintiffs-Appellees,

v.

EXXON CORPORATION, EXXON SHIPPING COMPANY,
Defendants.

No. 97-35190

D.C. No.

CV-89-00095-HRH

**OPINION**

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Appeals from the United States District Court

for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued and Submitted
May 3, 1999—Seattle, Washington

Filed October 12, 2000

Before: James R. Browning, Mary M. Schroeder,1 and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Schroeder

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1 Judge Schroeder was drawn to replace Judge Wiggins. She has read the briefs, reviewed the record and listened to the tape of oral argument held on May 3, 1999.

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**COUNSEL**

David C. Tarshes, Davis Wright Tremaine, LLP, Anchorage, Alaska, for the plaintiffs-appellees.

James vanR. Springer, Dickstein Shapiro Morin & Oshinsky, Washington, D.C., for the plaintiffs-appellees.

Brian B. O'Neill, Faegre & Benson, Minneapolis, Minnesota, for the plaintiffs-appellees.

John F. Daum, O'Melveny & Myers, LLP, Los Angeles, California, for defendants-appellants Exxon Corporation.

Bradley S. Keller, Byrnes & Keller, LLP, Seattle, Washington, for plaintiffs-appellants North Coast Seafood Processors, Inc.

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**OPINION**

SCHROEDER, Circuit Judge:

This appeal represents a small part of the massive litigation generated by the 1989 Exxon Valdez oil spill into the waters of Prince William Sound, Alaska. The dispute we consider here arises from the punitive damages claims filed against Exxon[2] by private parties injured by the spill and consolidated

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into a single mandatory class action in federal court. Aligned on one side in this appeal are Exxon and a group of plaintiff seafood processors known as the Seattle Seven. The Seattle Seven reached a $64 million settlement agreement with Exxon in the immediate aftermath of the Valdez spill. On the other side are the remaining class plaintiffs, referred to in this opinion as "plaintiffs."

The critical factual element is the settlement agreement between Exxon and the Seattle Seven. The Seattle Seven, who process seafood caught in Prince William Sound, sued Exxon for compensatory and punitive damages after the spill forced their operations to shut down for significant periods of time. The settlement agreement they reached with Exxon did

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[2] We follow the practice of other panels of this court who have decided cases involving the Exxon Valdez, and use "Exxon" to refer to Exxon Corporation, Exxon Shipping Company, Exxon Transportation Company, and any other related entity. See Eyak Native Village v. Exxon Corp., 25 F.3d 773, 774 n.1 (9th Cir. 1994).

not include a release and therefore did not formally terminate the Seattle Seven's claims against Exxon. The Seattle Seven agree, however, that they would not execute on any compensatory damages award entered in their favor and also would pay or "cede" back to Exxon any punitive damages they might recover. The agreement was subsequently modified to permit the Seattle Seven to retain a portion of the punitive damages award received.

Although both the district court and the plaintiffs knew that there had been a settlement agreement between Exxon and the Seattle Seven, neither knew of the existence of the cede back provision. Acting in its own best interest, Exxon chose not to inform the punitive damages jury either. On September 16, 1994, the jury assessed punitive damages against Exxon in the amount of $5 billion. The plan of allocation the plaintiffs eventually proposed for this award, and that the district court approved, did not include the Seattle Seven.

The central issue for us to decide is whether the jury should have been told of the cede back provision during the last phase of the punitive damages trial. The district court, agreeing with the class plaintiffs, held that Exxon's failure to affirmatively disclose this information to the jury merited

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exclusion of the Seattle Seven from the plan of allocation. Exxon and the Seattle Seven appeal this ruling.

Exxon's liability for any punitive damages, and the amount of punitives the jury imposed are challenged in related appeals. We here assume without deciding, for purposes of this appeal, the validity of the judgment against Exxon. We do not intimate what the result of that appeal will be.

## BACKGROUND

The oil tanker Exxon Valdez ran aground on the Bligh Reef in Prince William Sound, Alaska on the evening of March 23, 1989. Damage to the Valdez's cargo holds caused it to

spill 11 million gallons of oil into the Sound, resulting in a great environmental disaster. The spill grievously injured both the environment and the economic livelihood of those individuals who relied on the theretofore abundant marine life of the region for their livelihood.

The State of Alaska and the United States brought actions against Exxon for the injury to the environment. Those cases were resolved by entry of a consent decree on October 8, 1991, under the terms of which Exxon agreed to pay at least $900 million to restore damaged natural resources. See Eyak Native Village v. Exxon Corp., 25 F.3d 773, 775 (9th Cir. 1994).

The hundreds of private civil actions filed in federal court were consolidated before Judge H. Russel Holland of the District of Alaska. First the plaintiffs, and then Exxon moved the district court to certify a mandatory punitive damages class. Judge Holland granted Exxon's motion on April 19, 1994. Alaska's state courts agreed to recognize the class action as the only avenue through which any plaintiff, whether in state or federal court, could recover punitive damages from Exxon. See Chenega Corp. v. Exxon Corp., 991 P.2d 769, 775 (Alaska 1999).

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The Seattle Seven, the largest of the region's seafood processors, sued Exxon in 1989. Exxon sought to reach a settlement as quickly as possible, but its negotiations with the Seattle Seven and other plaintiffs revealed a roadblock posed by the increasing likelihood that a mandatory punitive damages class would be certified. Claims for compensatory damages could be easily disposed of by exchanging payment for releases, but a plaintiff's release of its slice of the future lump-sum punitive damages award merely reduced the number of claimants sharing the punitive damages pie, not the size of the pie itself. Exxon thus actually faced a financial disincentive to settle, because any amount of money it paid to persuade a plaintiff to forgo its slice would

nevertheless be included in the amount of the eventual award.

On January 8, 1991, the Seattle Seven and Exxon settled the Seattle Seven's claims for the 1989 and 1990 fishing seasons in exchange for a payment of $63.75 million. To avoid the punitive damages dilemma, the parties included in the agreement a "cede back" provision. The provision stated that the Seattle Seven would not release their punitive damages claims against Exxon but would instead remain parties to the litigation in order to receive their share of an eventual punitive damages award, which they would then cede back to Exxon. The existence of a settlement agreement was made known to the rest of the subsequent punitive damages class, but its terms were kept confidential.

The mandatory punitive damages class action was tried to a jury in three phases in 1994. The first determined that Captain Joseph Hazelwood's behavior had been reckless, a necessary prerequisite for an award of punitive damages. The second phase assessed the amount of compensatory damages attributable to the spill to give the jury guidance in fixing the appropriate amount of punitive damages. For purposes of this appeal, we need not question the determinations during those phases. The third phase fixed the amount of punitive damages.

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Before the third phase began, the parties entered into an Impact Stipulation. This described the harm the Valdez spill had caused private parties and quantified part of it by referring to the total amount already paid by Exxon to private parties in compensation (approximately $300 million). This figure included the approximately $64 million paid to the Seattle Seven under the 1991 settlement agreement.

In the third phase of the punitive damages proceedings, the plaintiffs emphasized to the jury the magnitude of the harm and the resulting need for punishment and deterrence. Exxon, for its part, sought to demonstrate that it had already accepted corporate responsibility by pointing to the fact that

in many cases, it had paid money to injured parties without requiring anything in return but a receipt and without requiring releases. Exxon's president testified that Exxon had paid "over $300 million" receiving only receipts in return, and thus, that it had received nothing of value in return for its payments. Exxon's counsel reiterated this in his closing argument. In fact, however, because the $300 million figure included amounts paid to parties such as the Seattle Seven, who did agree to settle their claims, these statements were inaccurate. The amount paid in return for nothing but receipts was actually somewhere around $168 million.

Exxon's apparent strategy to maximize to the jury what Exxon had already paid in order to minimize punitive damages did not work well. On September 16, 1994, the jury awarded punitive damages in the sum of $5 billion, at that time the largest award of its kind in history.

The next step was to allocate those damages among the plaintiffs in a manner proportionate to their injury. The original plan of allocation, drawn up by the non-settling plaintiffs, did not include the Seattle Seven because the Seven's lack of a financial interest in the recovery meant that they also lacked motivation to pursue a stake in the award. In order to create a financial incentive for the Seattle Seven, in 1996 Exxon

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negotiated a modification to the 1991 settlement agreement with the Seattle Seven. The modification permitted the Seattle Seven to retain $12.4 million of their punitive damage allocation rather than ceding it all back to Exxon.

The Seattle Seven then filed an objection to the proposed allocation with the district court, contesting their exclusion from the plan. At this point, the reason for the requested modification, the cede back provision, became known both to the district court and to the plaintiffs. The plaintiffs began vigorously to oppose inclusion of the Seattle Seven in the plan of allocation.

The district court agreed with the plaintiffs, originally taking the position that the cede back provision itself was unlawful as against public policy. The Seattle Seven and Exxon moved for reconsideration, supporting their motion with declarations of numerous legal luminaries, including former U.S. Attorneys General, judges of various U.S. Courts of Appeal, law professors, and an Alaska Supreme Court Justice, all to the effect that cede back agreements are ethical, enforceable, and necessary for the orderly administration of justice in mass tort cases.

Upon reconsideration, the district court agreed that the cede back agreement was not in and of itself unethical, but held that the Seattle Seven were nonetheless barred from participating in the allocation of damages because the jury was not told of the agreement's existence. The court's order stated that the problem was Exxon's failure to tell the jury "the whole story" regarding the agreements. The court emphasized its belief that the jury should have been entitled to determine how much Exxon should actually pay in punitive damages, out of its own pocket, stating: "Punitive damages are imposed to punish the conduct which juries determine to be reckless. The court has no doubt that the Exxon Valdez jury would be outraged if Exxon, through the Seattle Seven settlement

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agreement, rather than the claimants, were to wind up with almost 15% of the punitive damages award."

In this appeal, appellants Seattle Seven and Exxon contend both that cede back agreements are lawful and that for their proper administration, they must not be disclosed to juries. Otherwise, appellants argue, the jury in order to compensate for them or to prevent the defendant from paying less than what the jury believes is appropriate punishment will inflate the punitive damages award.

The appellee plaintiffs defend the district court's reasoning, arguing that such agreements are unethical and

unenforceable unless juries are told of them. They also contend that even if juries should ordinarily not be told, disclosure in this particular case was warranted by Exxon's exaggerated statements to the jury regarding the amount paid to claimants without releases in return. We review approval of the plan of allocation for abuse of discretion and any necessary legal questions do novo. See In re Mego Financial Corp. Sec. Litig., 213 F.3d 454, 460 (9th Cir. 2000).

There are accordingly three principal issues that we must consider in the disposition of this appeal: (1) the lawfulness and enforceability of cede back agreements like the one in this case; (2) whether, if lawful and enforceable, they should generally, as a matter of law, be kept from the jury; and (3) if they should ordinarily be kept secret, whether there were circumstances present in this case that should have required Exxon to tell the jury about the existence of this particular agreement. We hold that cede back agreements are enforceable; that in accordance with the general principle that indemnification arrangements should not be allowed to affect a jury's determination of damages, cede back agreements should not be disclosed to the jury; and, finally, that there are no circumstances in this case that would have warranted disclosing the terms of this cede back provision to the jury. We therefore conclude that the district court abused its discretion

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in approving a plan of allocation that denied enforceability of the settlement agreement between Exxon and the Seattle Seven and that barred the Seattle Seven from receiving any allocation of punitive damages.

## I. ENFORCEABILITY OF THE CEDE BACK PROVISION

In recent years, federal courts have become all too familiar with the peculiar problems posed by mass tort litigation. See, for example, Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) (asbestos); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996) (epilepsy medication); In re

Agent Orange Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987). Such litigation clogs dockets for decades, creating burdens on the judicial system and delaying relief for injured parties. As a result, the general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions. See Franklin v. Kaypro Corp., 884 F.2d 1222, 1229 (9th Cir. 1989) (stating that the fact that "there is an overriding public interest in settling and quieting litigation...is particularly true in class action suits."). It is unfortunately also true, however, that such settlements are difficult to reach. "[O]btaining a settlement in multi-party litigation may be quite complex." Id. at 1225. It will frequently be very close to impossible for a mass tort defendant to achieve a settlement with every potential plaintiff. The resulting presence of non-settling defendants, non-settling plaintiffs, or both, may seriously affect the parties' incentives to settle in the first place.

In addition to encouraging individual settlements, courts have encouraged the use of mandatory class actions to handle punitive damages claims in mass tort cases. Mandatory class actions avoid the unfairness that results when a few plaintiffs—those who win the race to the courthouse—bankrupt a defendant early in the litigation process. They also avoid the possible unfairness of punishing a defendant over and over

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again for the same tortious conduct. As a result, mandatory classes have been endorsed by many courts and commentators. See In re A.H. Robins Co., Inc., 880 F.2d 709, 738 (4th Cir. 1989) (recognizing that "the 'trend' of the authorities is clearly in the direction of a more liberal approach to the certification of the mass tort action"). See also II The American Law Institute, Enterprise Responsibility for Personal Injury 263 (Reporters' Study 1991) (recommending federal legislation to create nationwide mandatory punitive damages classes); Richard A. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 61 (1983) (arguing that

only class actions provide a practical means for resolving the problems that accompany punitive damage awards in mass tort litigation).

One drawback to the mandatory class action, however, is that it makes it even more difficult to settle the claims of any individual plaintiff. Because punitive damages in a mandatory class action are awarded in one lump sum, a defendant has a serious disincentive to settle with any plaintiff unless it can negotiate a settlement with them all, a staggering feat if not a practical impossibility. Partial settlement merely reduces the number of plaintiffs who share an eventual award. It does not reduce the award's amount. Because a defendant like Exxon would presumably be indifferent as to whether it paid 10,000 plaintiffs $500,000 each or 500,000 plaintiffs $10,000 each, the creation of mandatory punitive damages classes cuts against the strong judicial policy of encouraging settlement in class actions.

We deal here with multiple plaintiffs suing one defendant, but an analogous problem frequently occurs in the more typical situation of a single plaintiff with claims against multiple defendants. When a plaintiff is able to settle with fewer than all of the defendants, the question becomes how to determine what share of a jury's total assessment of damages a non-settling defendant should pay. Courts agree that the non-

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settling defendant does not have to pay the entirety of any eventual damages award. They diverge, however, on the issue of apportionment, taking three distinct approaches. See McDermott, Inc. v. Clyde, 511 U.S. 202, 215-17 (1994) (explaining the three approaches).

Under the first approach, the non-settling defendant pays the entire amount of the award less the actual amount the plaintiff has already received from the settling defendant, even if this total turns out to be in excess of the non-settling defendant's share of the fault as determined by the jury. The non-settling defendant then retains the right to seek

contribution from the settling defendant in order to bring total payments in line with allocation of fault. This is called the "pro tanto with contribution" approach, and it creates little incentive for any defendant to settle.

The second approach is known as "pro tanto without contribution." Under this approach, the non-settling defendant pays the entire amount of the award less the amount of the settlement and does not retain the right to seek contribution. This helps ensure that the plaintiff receives the full amount of damages and maintains incentives to settle, but can result in the non-settling defendant paying more than its share of fault.

Finally, under the "proportionate share" approach, the non-settling defendant pays only the amount of the award that is allocable to its share of the fault, as determined by the jury. The proportionate share approach is the law in the Ninth Circuit, has been adopted by the Supreme Court for use in maritime actions, and is the approach recommended by the American Law Institute. See Kaypro, 884 F.2d at 1231. See also McDermott, 511 U.S. at 217; Restatement (Third) of Torts: Apportionment of Liability § 16.

The main advantage of the proportionate share approach is that it is the only one of the three that combines fairness to all parties with an appropriate balance of individual incentives to

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settle. The effect of proportionate share apportionment, however, is that the actual amount of damages the plaintiff receives will deviate from the amount awarded by the jury, unless the amount of the settlement exactly matches the settling defendant's share of fault as subsequently determined by the jury. If the jury later determines that the settling defendant's share of fault is less than the amount paid in settlement, this will result in a windfall to the plaintiff. If the jury's allocation is higher, this will result in a shortfall.

This case differs from the typical situation in that we do not have a single plaintiff seeking to recover a single award from multiple defendants. The Exxon Valdez punitive damages class involves multiple plaintiffs seeking to recover a single award from a single defendant. Neither our court nor leading authorities have addressed this situation. The potential distortion of settlement incentives that occurs when some parties settle and some do not is the same, however, as with the multiple defendant situation. If Exxon could have been sure that the district court would eventually adopt a form of the proportionate share approach, permitting non-settling plaintiffs to recover damages only in proportion to their allocation of harm and allowing the remaining punitives to go uncollected, settlement incentives would have been preserved and the cede back provision would not have been necessary. Exxon had no such certainty, though (and indeed, the district court eventually refused to adopt such a method). Exxon therefore sought to achieve a proportionate share result without the court's assistance by adding the cede back provision to its settlement agreement with the Seattle Seven.

An analogous type of cede back agreement has been used in the multiple-defendant context and is called a Pierringer release, after the leading case to consider it, Pierringer v. Hoger, 124 N.W.2d 106 (Wis. 1963). Pierringer releases have been approved in Wisconsin and Minnesota. See id.; Frey v. Snelgrove, 269 N.W.2d 918, 922 (Minn. 1978).

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Pierringer releases have the effect of reaching a proportionate share result and have principally been used in jurisdictions that adhere to the "pro tanto with contribution" approach. A plaintiff who settles with one of multiple defendants agrees to indemnify that defendant for any eventual contribution action brought by the non-settling defendants after the entry of judgment. See Peter B. Knapp, Keeping the Pierringer Promise: Fair Settlements and Fair Trials, 20 Wm. Mitchell L. Rev. 1 (1994).

The Supreme Court has recognized that Pierringer releases mitigate the adverse effect on settlement that exists under a

"pro tanto with contribution" regime, but has worried that the prospect of indemnity actions might add "yet another potential burden on the courts." McDermott, 511 U.S. at 212. As a practical matter, however, Pierringer releases do not require the actual litigation of a contribution action, followed by an indemnity action. The portion of the judgment allocable to the settling defendant's fault is simply considered uncollectible, just as it would be under the proportionate share approach. See Austin v. Raymark Ind., Inc., 841 F.2d 1184, 1190 (1st Cir. 1988) (stating that through a Pierringer release, a non-settling defendant "effectively obtain[s] its contribution from the settling defendants by having assessed against it only its own percentage of liability"). Similarly, in the multiple plaintiff context, a non-settling plaintiff through a cede back agreement obtains only its proportionate share of the entire punitive damages award.

What Exxon and the Seattle Seven did, therefore, was use a Pierringer device to obtain the functional equivalent of a proportionate share allocation of damages. Since both the Ninth Circuit and the Supreme Court have endorsed the proportionate share approach because of its superiority in blending fairness to the parties with incentives to settle, we cannot hold such an agreement unenforceable as a matter of public policy. Far from being unethical, cede back agreements make it easier to administer mandatory class actions for the assessment of punitive damages and encourage settlement in mass tort cases. As a result, such agreements should typically be enforced.

## II. WHETHER CEDE BACK AGREEMENTS SHOULD GENERALLY BE DISCLOSED TO THE JURY

The district court in this case held that cede back agreements, though ethical, should be disclosed to the jury because the jury should be able to take them into account in assessing punitive damages. Exxon and the Seattle Seven contend, however, that juries should never be told. They argue persuasively that the salutary purposes of such agreements would be frustrated if the jury knew about the terms of the

agreement and were permitted to offset them by increasing damages. We agree.

If a jury was told that the defendant would eventually get back a portion of the punitive damages assessed, the jury would likely compensate by imposing more damages, thereby assuring that the defendant would pay the entire amount deemed appropriate by the jury. This is exactly what the district court believed the jury should have been permitted to do in this case. Yet if that were to be the result of the settlement agreement, from the defendant's perspective there would be no point in settling in the first place. The defendant would still have to pay the full amount assessed by the jury, in addition to the amount paid in settlement.

This is what we have recognized elsewhere in our law: that a jury should assess damages but not determine how much defendants should "actually" pay or how much plaintiffs should "actually" receive. In Larez v. Holcomb, 16 F.3d 1513 (9th Cir. 1994), we held that it was prejudicial error to inform a jury deliberating on an award of punitive damages that the defendant would be indemnified by his employer for any such award. See id. at 1520-21. We stated that a jury's task is to arrive at a "dispassionate" determination of the proper award,

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and that evidence of indemnification might have tempted the jury to inflate the award out of sympathy for the plaintiff. See id. at 1519. Similarly, we held in Brooks v. Cook, 938 F.2d 1048 (9th Cir. 1991), that juries should not be told about the availability of attorneys' fees when fixing an award for a prevailing plaintiff. We explained that "the fear is that a jury, informed of plaintiff's right to additional funds, will view the money as a windfall and take steps to offset it." Id. at 1052.

These principles are not unique to this circuit. It is uniformly held that absent exceptional circumstances, a jury deliberating on the amount of a damages award is not to

consider where the funds what constitute that award will come from, or where they will end up. For example, the states of Georgia and Oregon both have enacted tort reform measures that provide that large portions of punitive damages awards (75 percent in Georgia and 50 percent in Oregon) go to the state or state-designated charities rather than the prevailing plaintiff. Both states have held that it is prejudicial error to inform the jury of this ultimate outcome, because of the temptation for the jury to inflate the award in order to more fully compensate the plaintiff. See Ford v. Uniroyal Goodrich Tire Co., 476 S.E.2d 565, 570-71 (Ga. 1996); Honeywell v. Sterling Furniture Co., 797 P.2d 1019 (Ore. 1990). Similarly, the Supreme Court of Minnesota has held that juries should not be informed that a finding of a certain percentage of comparative negligence on the part of the plaintiff will serve to reduce the damages award by that percentage. See Rosenthal v. Kolars, 231 N.W.2d 285, 288 (Minn. 1975). Juries are also not to be told of statutory caps on damages, or, in antitrust and RICO case, that damages will eventually be trebled. See Sasaki v. Class, 92 F.3d 232, 237 (4th Cir. 1996) (holding that informing a jury of a statutory cap on damages for one of plaintiff's claims may have led to an increased award on the non-capped claim); HBE Leasing Corp. v. Frank, 22 F.3d 41, 45-46 (2d Cir. 1994) (holding that informing a jury of RICO's treble damage provision may confuse or prejudice jury into lowering the award in order to counteract the trebling effect);

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Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240, 1242-43 (5th Cir. 1974) (treble damages); Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361, 1370 (10th Cir. 1972) (treble damages); Weiss v. Goldfarb, 713 A.2d 427, 480 (N.J. 1988) (holding that informing a jury of a statutory cap on damages that applied to one defendant may have led the jury to increase the amount of damages allocable to other, non-capped defendants). The message from these cases is the same: juries are to be kept free of any outside influence that might lead them to inflate or reduce their damages award in order to "secure justice" for the parties. See Rosenthal, 231 N.W.2d at 288.

In cases involving settling and non-settling defendants, several states provide by statute that in allocating fault, the jury cannot be told of a settlement or its terms. See Conn. Gen. Stat. § 52-216a; Fla. Stat. Ch. 768.041; Maine Rev. Stat. Ann. § 163; N.H. Rev. Stat. Ann. § 507:7-i; N.Y. C.P.L.R. 4533-b (McKinney). The reason for this is the danger that the jury will adjust its award of damages according to the amount of the settlement. See Builder's Square, Inc. v. Shaw, 755 So.2d 721, 725 (Fl. Ct. App. 1999). If the jury perceives that the settlement amount is low, for example, it might be tempted to increase the amount of fault allocable to the non-settling defendants in order to maximize the plaintiff's recovery.

In Minnesota, a state that has recognized the validity of agreements similar to the cede back provision in this case, the Supreme Court has held that the existence of a Pierringer release may be admissible for limited purposes such as to show witness bias. The court must exercise its discretion, however, as to what details of the agreement should be provided to the jury, and "as a general rule the amount paid in settlement should never be submitted." Frey v. Snelgrove, 269 N.W.2d 918, 923 (Minn. 1978). Thus, the existence of an agreement between the parties is clearly relevant should the settling defendant attempt to testify at trial in a manner favorable to the plaintiff. The details of the agreement should not

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be disclosed, though, and the evidence admitted should be limited to avoid distorting the jury's deliberations on damages. See id. See also 23 Wright & Miller, Federal Practice and Procedure § 5311 (commenting that when evidence of a settlement agreement is admissible to show witness bias, "it is true that often the fact of a compromise will suffice to show bias and that exploring the details will increase the prejudice to the opposing party without any appreciable effect on the credibility of the witness"); Restatement (Third) of Torts: Apportionment of Liability § 24, Reporters' Note, comment i (recommending that when

the fact of a settlement agreement is admissible to show witness bias, the agreement itself should not be admitted into evidence, and that if it is, potentially prejudicial portions of it should be redacted).

Therefore, it is clear that cede back agreements should generally not be revealed to juries deliberating on punitive damages. The only remaining question is whether any particular circumstances in this case warranted an exception from this general rule.

## III. SPECIAL CIRCUMSTANCES

The plaintiffs argue that even if evidence of a cede back agreement would ordinarily be kept from a jury, Exxon should have volunteered it in this case to correct the false impression Exxon created when it announced that it had paid out $300 million in compensation requiring only receipts on return when the correct figure was approximately $168 million. They further argue that the fact that the exaggeration went uncorrected justifies the district court's decision to exclude the Seattle Seven from the plan of allocation and render the cede back provision completely unenforceable.

The plaintiffs rely on Lawson v. Trowbridge, 153 F.3d 368 (7th Cir. 1998). Lawson holds that otherwise inadmissible evidence of indemnification may be admitted on cross-examination to impeach a testifying defendant who intimates

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to the jury that he will be financially ruined by a large damages award. See id. at 379. Lawson does not concern the enforceability of the underlying indemnification agreement.

We will not extend Lawson beyond its holding to justify the district court's exclusion of the Seattle Seven from the plan of allocation on the basis of Exxon's trial conduct. Denying the Seattle Seven recovery on the basis of Exxon's actions would be manifestly unfair.

As for Exxon itself, we do not condone its conduct. The exaggerations it made at trial, however, have little, if anything, to do with the cede back provision. Exxon stated that it had paid out $300 million requiring only receipts in return; the only correction necessary was the alteration of that figure to $168 million. There would have been no need to mention the cede back provision, and thus no need to disturb the general rule that such agreements should be ordinarily be [sic] kept from the jury. Furthermore, the only conceivable prejudice the plaintiffs could have suffered when Exxon overstated its corporate benevolence would have been a downward adjustment by the jury of the damages award, and the proper remedy for such prejudice would be a new trial on punitive damages. The plaintiffs have never claimed that $5 billion was too low an award, however, nor have they ever sought a new trial. Refusing to enforce the cede back provision is not a remedy that relates to the error complained of.

## IV. OTHER ARGUMENTS

The plaintiffs raise on appeal two alternative arguments in support of the district court's decision to exclude the Seattle Seven from the plan of allocation. First, the plaintiffs claim that because the Seattle Seven "settled" their claims against Exxon, they have no right to claim a share of punitive damages regardless of the existence of the cede back provision. It is clear, however, that the settlement agreement did not contain a release of any claims; it merely "settled" the matter of

13085

what would happen to the claims once the claims were finally adjudicated. Second, the plaintiffs argue that public policy precludes any agreement that diminishes the deterrent effect of a punitive damages award. This argument runs contrary to the law of this circuit, which permits indemnification agreements and the settlement and release of punitive damages claims. As exemplified by Larez, it is not up to the jury to decide how much a defendant must actually

pay at the end of the day, or how much a plaintiff will actually receive. We therefore reject both of the plaintiffs' alternative arguments.

## CONCLUSION

We hold that the district court abused its discretion in approving the plan of allocation over the Seattle Seven's objection. Cede back agreements are lawful and enforceable, and generally should not be disclosed to the jury. No special circumstances in this case justify the district court's refusal to enforce the cede back agreement between Exxon and the Seattle Seven. As a result, the existence of the cede back agreement cannot justify exclusion of the Seattle Seven from the plan of allocation.

The approval of the Allocation Plan is VACATED and the matter is REMANDED.

13086

FILED
DEC 18 2000
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| SEA HAWK SEAFOODS, INC.; COOK INLET PROCESSORS, INC.; SAGAYA CORP.; WILLIAM McMURREN; PATRICK L. McMURREN; WILLIAM W. KING; GEORGE C. NORRIS; HUNTER CRANZ; RICHARD FEENSTRA; WILDERNESS SAILING SAFARIS; SEAFOOD SALES, INC.; RAPID SYSTEMS PACIFIC, LTD., | ) No. 99-35878<br>)<br>) D.C. No. CV-89-00095-HRH<br>)<br>)<br>) MEMORANDUM[1] |
| Plaintiffs-Appellees, | |
| and | |
| WESTERN ALASKA FISHERIES, INC., | |
| Claimant-Appellant, | |
| v. | |
| EXXON CORP., a New Jersey Corp., | |

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Defendant,

and

DISCOVERY MASTER,

Appellee.

Appeal from the United States District Court
for the District of Alaska (Anchorage)
H. Russel Holland, Chief Judge, Presiding

Argued and Submitted November 9, 2000
San Francisco, California

Before: SCHROEDER, Chief Judge, BROWNING, KLEINFELD, Circuit Judges.

Western Alaska Fisheries, Inc. appeals the district court's approval of a plan of distribution, which excluded them from recovering a portion of the $5 billion punitive damage verdict against Exxon for the Valdez oil spill on the ground that they had failed to file an independent lawsuit against Exxon. We review a district court's approval of a plan of distribution for abuse of discretion but consider any legal questions de novo. See In re Exxon Valdez, 229 F.3d 790, 795 (9th Cir. 2000); In re Mego Financial Corp. Sec. Litig., 213 F.3d 454, 460 (9th Cir. 2000).

The time periods for filing notices of appeal are governed by Fed.R.App.P. 4. These periods are "mandatory and jurisdictional." Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)); see also Vahan v. Shalala, 30 F.3d 102 (9th Cir. 1994). Unless the notice of appeal is filed within the time fixed by Rule 4, we lack jurisdiction. See Torres v. Oakland Scavanger Co., 487 U.S. 312, 317 (1988).

Under Fed.R.App.P. 4(a)(3), "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed." Exxon filed a timely notice of appeal on August 20, 1999. Western Alaska filed a notice of appeal four days later, within the 14 days permitted by Rule 4(a)(3). Western Alaska's notice of appeal was therefore timely.

Fed.R.Civ.P. 23(c)(1) authorizes district courts to alter or amend class certification orders only "before the decision on the merits." The reference to "before" plainly implies disapproval of such alteration or amendment "afterward." Vizcaino v. U.S. District Court, 173 F.3d 713, 721, *as amended* 184 F.3d 1070 (9th Cir. 1999). The mandatory punitive damages class, as defined in the class certification order and Plan of Allocation, consisted of all persons and entities that "possess" or "have asserted" a claim for punitive damages against Exxon arising from the spill. Western Alaska plainly met the class definition. The "timely lawsuit" requirement narrowed the mandatory class, excluding seafood processors that had relied on the plain language of the class certification order and notice. Such notice expressly instructed that putative class members *need not* have brought a lawsuit in any court to be a member of the mandatory class and that they *could not* file an independent lawsuit once the class was certified. The class definition was reaffirmed in the Plan of Allocation, which imposed a "timely lawsuit" requirement on only one of the fourteen claim categories, the "Area Businesses" category. At no point prior to the jury verdict was a "timely lawsuit" requirement imposed on seafood processors; Rule 23(c)(1) prohibits imposition of one afterward. As the order approving the seafood processor plan of distribution was entered on July 23, 1999, nearly five years after the jury returned its punitive damage verdict against Exxon and nearly three years after judgment was entered on the $5 billion award, addition of the "timely lawsuit" requirement was untimely and an abuse of discretion

There is no merit in Plaintiff's argument that punitive damages are unavailable, as a matter of law, to persons who have not asserted compensatory damage claims through an independent lawsuit. Under federal law, including federal maritime law, punitive damages are available to any person or entity that suffered actual injury arising from a defendant's violation of a federally protected right, independent of whether legal injury is established at trial. See Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 514 (9th Cir. 2000) ("[P]unitive damages may be awarded in the absence of compensatory or nominal damages, as long as the plaintiff has shown that the defendant violated a federally protected right."); Bise v. Int'l Brotherhood of Electrical Workers, 618 F.2d 1299, 1305-06 (9th Cir. 1979) (punitive damages are permissible to vindicate invasion of protected federal rights, even where plaintiffs fail to prove legal entitlement to compensatory damages); Gill v. Manuel, 488 F.2d 799, 802 (9th Cir. 1973) ("[A]n award of compensatory damages is not a necessary prerequisite to an award of punitive damages [under 42 U.S.C. § 1983].").

The "timely lawsuit" requirement in the seafood processor plan of distribution is vacated, with instructions to allow Western Alaska to share in the punitive damages recovery on the same basis as the other 33 eligible seafood processors.

VACATED AND REMANDED.

FILED
JUL 23 1999
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| In re: | |
| The EXXON VALDEZ | Case No. A89-095-CV (HRH) (Consolidated) |
| THIS DOCUMENT RELATES TO ALL CASES | |

ORDER NO. 348

FINAL APPROVAL OF THE PLAN OF DISTRIBUTION OF ALLOCATIONS TO THE PROCESSOR CLAIM CATEGORY

On August 13, 1997, the court conducted a final approval hearing on the plan of distribution of allocations to the various claim categories in the Exxon Valdez oil spill litigation. Plaintiffs submitted fifty-one separate proposed orders, each involving a separate allocation plan. To date, the court has granted final approval of fifty allocation plans. The court will now consider the Plan of Distribution of Allocations to the Processor Claim category.

A distribution plan will be approved where it is "fundamentally fair, adequate, and reasonable." Officers of Justice v. Civil Serv. Comm'n of the City and County of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982) (citation omitted).

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole is fair, reasonable and adequate to all concerned.

Id. at 625.

The proposed Processor Plan of Distribution establishes four criteria for participation. A claimant must: (1) have been engaged in commercial seafood processing operations and suffered economic losses proximately caused by the Exxon Valdez oil spill; (2) be a signatory to plaintiffs' joint prosecution agreement; (3) have filed a timely lawsuit on its own behalf as a direct action plaintiff or putative class representative; and (4) not have settled and released all its claims against the Exxon defendants.[1] Plaintiffs state that in applying these criteria, thirty-three Seafood Processors (Participating Processors) are eligible to participate in the Processor Plan of Distribution.

Plaintiffs state further that the Processor Plan of Distribution is the product of a consensus among the Participating Processors. These Participating Processors agreed to the benchmark compensatory damages figure and agreed to be bound by that figure for purposes of the Plan of Distribution.

Exxon Corporation, Western Alaska Fisheries, Inc., John Cabot Co., Inc., Cook Inlet Processing, and Nautilus Marine Enterprises, Inc. submitted objections to the Processor Plan

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[1] All Plaintiffs Motion for Order Preliminarily Approving Processor Distribution Plan and Approving the Notice of the Request for Approval of Such Plan. Clerk's Docket No. 7010 at 7.

of Distribution. The court will determine whether the objections render the Plan unfair, inadequate or unreasonable and justify setting aside the Plan.

Exxon's Objection

Exxon objects to the Plan based on settlements that it entered into with Dragnet Fisheries Co., Inc. (Dragnet), Western Alaska Fisheries, Inc. (Western), Inlet Fisheries, Inc. (Inlet), Copper River Fishermen's Cooperative (Copper River), Sea Hawk Seafoods, Inc. (Sea Hawk), and Kodiak Salmon Packers, Inc. (Kodiak) in 1990. Under the terms of the settlements, Exxon paid the Processors $13.6 million. The settlements provided that the Processors would release Exxon from compensatory damage claims for 1989, retain their compensatory damage claims for the years after 1989, and share any recovery of punitive damages with Exxon.

Plaintiffs refer to Western, Dragnet, and Inlet as "Non-Participating Processors" because they failed to comply with the Class Certification Order, failed to file a timely lawsuit against Exxon, and failed to sign the Joint Prosecution Agreement. The Class Certification Order stated that "putative class members of this decertified Area Business Class shall have 180 days from this date [March 14, 1994] to commence an action on a claim arising out of or related to the Exxon Valdez oil spill or be barred from suing on such claims"[2]

The Plan of Allocation incorporated the language of the Class Certification Order and stated that "[c]laims will be recognized only for businesses which filed timely lawsuits in compliance with the Class Certification Order."[3] The court finds that compliance with the Class Certification Order is a fair and objective criterion to identify Participating Processors. The Exxon Valdez litigation has been incredibly complex, in terms of both legal issues and

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[2] Class Certification Order, Clerk's Docket No. 4653 at 3.

[3] Plan of Allocation, Clerk's Docket No. 6603 at 13 n.16.

case management. Consequently, the court has issued rulings, such as the Class Certification Order, requiring timely action by the parties, and compliance with the Class Certification Order is a reasonable prerequisite to participating in the Processor Plan of Distribution.

Exxon argues that it was unnecessary for the Non-Participating Processors to comply with the Class Certification Order because they could have asserted claims under the Trans-Alaska Pipeline Authorization Act (TAPAA), or under Alaska's Environment Conservation Act" (the "Alaska Act"). Exxon, however, does not contend that any of the Non-Participating Processors made a claim against the TAPAA Fund. Regardless, such a claim would not have amounted to a claim against Exxon, and would not have satisfied the requirements of the Class Certification Order. Likewise, a claim under the Alaska Act would not satisfy the requirements of the Class Certification Order. Exxon's arguments that the Plan should be restructured to include Non-Participating Processors does not render the Plan unfair, inadequate, or unreasonable, and the court rejects Exxon's arguments on this issue.

Exxon also asserts that it is entitled to participate in the Plan based on its settlement agreements with Copper River, Sea Hawk, and Kodiak. These Processors, which are listed as Participating Processors in the Plan of Allocation, each settled their compensatory damages for either the calendar year 1989, or for calendar year 1989 and a portion of 1990. They also assigned to Exxon claims for punitive damages directly related to the settled compensatory damage claims. Copper River, Sea Hawk, and Kodiak, however, also expressly excepted and reserved all of their claims, including punitive damages, for the periods after they settled with Exxon.

In response to an inquiry from the court,[4] plaintiffs state that Copper River, Sea Hawk, and Kodiak will be assigned a null value to their claims for the periods they settled with Exxon. These Processors will then be treated like the Seattle Seven Processors, who settled their claims with and assigned their punitive damages to, Exxon. Plaintiffs intend, however, to allow Copper River, Sea Hawk and Kodiak to participate in the Processor Distribution Plan, but base their share of allocations solely upon their compensatory damages for the periods after their settlements with Exxon.

Plaintiffs' Plan of Distribution with respect to Copper River, Kodiak, and Sea Hawk is fair, adequate, and reasonable, and consistent with the court's intent to prevent Exxon from sharing in the punitive damages. Exxon's arguments regarding Copper River, Kodiak, and Sea Hawk are rejected.

Exxon also argues that the Plan is vague, but the Plan carefully explains the recoveries, eligibility criteria, methodology, and anticipated distribution proceeds. Exxon argues that Participating Processors who settled claims for 1989 lost profits should have those damages included in the Plan of Distribution with no adjustments for settlements. If Exxon's argument were adopted, it would result in certain Processors recovering damages twice for 1989: once as part of a settlement, and again from the Plan of Distribution. The Processors who settled, however, agreed that the 1989 lost profits would be excluded from the damages matrix.

None of Exxon's arguments render the Processor Plan of Distribution unfair, inadequate, or unreasonable, and the court rejects Exxon's arguments in their entirety.

Western Alaska Fisheries, Inc.'s Objection

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[4] The court requested additional information from the Plaintiffs at Clerk's Docket No. 7316. The Plaintiffs responded at Clerk's Docket No. 7317.

Western is one of the Non-Participating Processors on which Exxon bases its claim. Western failed to file suit against Exxon as required by the Class Certification Order. The court has already found that the Plan's criteria, including the requirement that a Processor file a timely lawsuit, are fair, adequate, and reasonable. Western's arguments to the contrary are rejected.

Western also argues that it should be entitled to take its share "off the top" in the manner in which certain Native Corporations were compensated. The Native Corporations, however, unlike Western, timely asserted and preserved their claims against Exxon. Western's argument is rejected.

John Cabot Company's Objection

The John Cabot Company (Cabot) failed to file suit against Exxon and is not among the list of Participating Processors. Having failed to meet the criteria for participating in the Plan, the court rejects Cabot's objection.

Cook Inlet Processing's Objection

The Plan of Distribution as to Cook Inlet Processing (CIP) excludes, for distributional purposes, CIP's 1989 compensatory damages and all punitive damages. The Plan is fair, adequate, and reasonable with respect to CIP because CIP settled with Exxon and released its 1989 compensatory damages claims and all of its punitive damages claims. CIP is being treated in the same manner as other Processors that settled with Exxon, and the court rejects CIP's objection.

Nautilus Marine Enterprises, Inc.'s Objection

The Plan of Distribution as to Nautilus Martine Enterprises, Inc. (Nautilus) excludes, for distributional purposes, Nautilus' 1989 compensatory damages and all punitive damages. The Plan is fair, adequate, and reasonable with respect to Nautilus because Nautilus settled with Exxon and released its 1989 compensatory damages claims and all of its punitive damages claims. Nautilus is

being treated in the same manner as other Processors that settled with Exxon, and the court rejects Nautilus' objection.

## Conclusion

The court grants final approval to the Plan of Distribution of allocations to the Processor Claim Category.[5]

Dated at Anchorage, Alaska, this 23 day of July, 1999.

/S/
H. Russel Holland, Judge
District of Alaska

[5] Plaintiffs' Motion to Strike Exxon's Reply Memorandum on Objections to Processor Distribution Plan is denied as moot. Clerk's Docket No. 7072.

FILED
JAN 26 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| In re: THE EXXON VALDEZ | ) No. 99-35864 |
| | ) |
| | ) DC# CV-89- |
| COOK INLET PROCESSORS, INC., | ) 00095-HRH |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| GRANT BAKER, as class representatives of the Mandatory Punitive Damages class; and all persons similarly situated; ALASKA SPORT FISHING ASSOCIATION; LOUIS E. ALBER, AHMET ARTUNER; JEFFREY BAILEY; WILLIAM BENNETT; MICHAEL WAYNE BULLOCK, ROBYNE L. BUTLER; ALBERT RAY CARROLL; DEBRA LEE, INC.; DEW DROP, INC.; LARRY L. DOOLEY, MARK DOUMIT; STEVE DOUMIT; DOUGLAS R. JENSEN; DENNIS G. JOHNSON; DONALD P. KOMPKOFF, Sr.; JOSEPH KOPECKY; DANIEL LOWELL; ANDREAN E. MARTUSHEFF; CAROL ANN MAXWELL; JACQUELAN JILL MAXWELL; ROBERT A. MAXWELL, Sr.; MICHAEL | ) |

McLENAGHAN; ELENORE E. McMULLEN; LESLIE R. MEREDITH; NATIVE VILLAGE OF TATITLEK; LEONARD S. OGLE; STEVEN T. OLSEN; AUGUST M. PEDERSEN, Jr.; MARY LOU REDMOND; JOSEPH DAVID STANTON; JEAN A. TISDALL; DARRELL WOOD,

Plaintiffs-Appellees,

and

EXXON CORP., aka Exxon Mobil Company; Captain JOSEPH HAZELWOOD; EXXON SHIPPING CO.,

Defendants-Appellees.

---

NAUTILUS MARINE ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

GRANT BAKER, et al., as class representative of the Mandatory Punitive Damages class; and all persons similarly situated; ALASKA SPORT FISHING ASSOCIATION; LOUIE E. ALBER; AHMET ARTUNER; JEFFREY BAILEY; WILLIAM BENNETT; MICHAEL WAYNE BULLOCK; ROBYNE L. BUTLER; ALBERT RAY CARROLL; DEBRA LEE, INC.;

No. 99-35866

DC# CV-89-00095-HRH
District of Alaska
(Anchorage)

**ORDER**

DEW DROP, INC.; LARRY L. DOOLEY; MARK DOUMIT; STEVE DOUMIT; DOUGLAS R. JENSEN; DENNIS G. JOHNSON; DONALD P. KOMPKOFF, Sr.; JOSEF KOPECKY; DANIEL LOWELL; ANDREAN E. MARTUSHEFF; CAROL ANN MAXWELL; JACQUELAN JILL MAXWELL; ROBERT A. MAXWELL, Sr.; MICHAEL McLENAGHAN; ELEANORE E. McMULLEN; LESLIE R. MEREDITH; NATIVE VILLAGE OF TATITLEK; LEONARD S. OGLE; STEVEN T. OLSEN; AUGUST M. PEDERSON, Jr.; MARY LOU REDMOND; JOSEPH DAVID STANTON; JEAN A. TISDALL; DARRELL WOOD,

Plaintiffs-Appellees,

and

EXXON CORP., aka Exxon Mobil Corporation; EXXON SHIPPING CO.; JOSEPH HAZELWOOD, Captain,

Defendants-Appellees.

BEFORE: SCHROEDER, BROWNING and KLEINFELD, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Judges Schroeder and Kleinfeld have voted to deny the petition for rehearing en banc, and Judge Browning so recommends.

The full court has been advised of the petition for an en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

**FILED**

**JUDGMENT IN A CIVIL CASE**

SEP 16 1994
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By_____ Deputy

***In re the EXXON VALDEZ***

*Case Number: A89-0095—CV (HRH) Consolidated*
*Re: All Cases*

___ ***JURY VERDICT.*** *This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.*

___ ***DECISION BY COURT.*** *This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.*

*IT IS ORDERED AND ADJUSTED*

*THAT, based upon the jury verdicts in Phases I and III, all plaintiffs in the Mandatory Punitive Damages Class recover from the Exxon defendants punitive damages in the amount of $5,000,000,000.00 and from defendant Hazelwood punitive damages in the amount of $5,000.00.*

*APPROVED:*

*/s/*
*U.S. District Court Judge*

*September 16, 1994* *PHYLLIS RHODES*

*Date*

*Clerk*

*/S/*
*(By) Deputy clerk*

*cc: O&J*
*L. Miller*
*D. Serdahely*
*D. Ruskin*

****JUDGMENT VACATED BY ORDER DATED 10-24-94 AT DOCKET NO. 6055****

**FILED**

APR 15 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By _____/s/_____, Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| In re | ) | |
| | ) | No. A89-095-CV (HRH) |
| the EXXON VALDEZ | ) | (Consolidated) |
| _____ | ) | |

**RE: ALL CASES**

ORDER NO. 204

**ORDER GRANTING CONDITIONAL FINAL APPROVAL AND CERTIFYING MANDATORY PUNITIVE DAMAGES CLASS**

The Court now has before it the motion of defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2), as counterclaimants, for certification of a mandatory punitive damages class pursuant to Rule 23(b)(1)(B), Federal Rules of Civil Procedure.[1] The court previously granted leave to these defendants to file a class action counterclaim, and granted conditional, preliminary approval of a mandatory punitive damages class. Amended Order 180. Promptly following the entry of Amended Order 180, notice was given by mail to all persons who have claims for punitive damages against Exxon and/or Exxon Shipping, and such persons were given an opportunity to file objections to

[1] Clerk's Docket No. 4470.

certification of the class. In addition, the court received oppositions to the motion from a number of plaintiffs in this court and in the Superior Court. The court has heard oral argument.

Conditional final approval of a mandatory punitive damages class is now granted, on the terms and conditions set forth below.

Pursuant to the provisions of Rule 23(b)(1)(B), Federal Rules of Civil Procedure, and the other terms of this order, the plaintiffs and/or counterclaim defendants listed in Exhibit A (attached hereto) are conditionally certified as representatives of an approved class. The class consists of all persons or entities who possess or have asserted claims for punitive damages against Exxon and/or Exxon Shipping which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill.

The court appoints as counsel for the class the following:

Kenneth L. Adams
DICKSTEIN, SHAPIRO & MORIN
2101 "L" Street, N.W.
Washington, D.C. 20037

Jerry S. Cohen
COHEN, MILSTEIN, HAUSFELD & TOLL
1401 New York Avenue, N.W., Suite 600
Washington, D.C. 20005

Richard F. Gerry
CASEY, GERRY, CASEY, WESTBROOK, REED & SCHENK
110 Laurel Street
San Diego, Calif. 92101

Mathew D. Jamin
JAMIN, EBELL, BOLGER & GENTRY
323 Carolyn Street

Kodiak, Alaska 99615

Arnold Levin
LEVIN, FISHBEIN, SEDRAN & BERMAN
320 Walnut Street, Suite 600
Philadelphia, Penn. 19106

Lloyd B. Miller
SONOSKY, CHAMBERS, SACHSE, MILLER,
MUNSON & CLOCKSIN
900 West 5th Avenue, Suite 700
Anchorage, Alaska 99501

Laddie Montague
BERGER & MONTAGUE
1622 Locust Street
Philadelphia, Penn. 19103

David W. Oesting
DAVIS WRIGHT TREMAINE
550 West 7th Avenue, Suite 1450
Anchorage, Alaska 99501

Brian B. O'Neill
FAEGRE & BENSON
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minn. 55402

Lynn Lincoln Sarko
KELLER ROHRBACK
1201 Third Avenue, Suite 3200
Seattle, Wash. 98101

Randall Scarlett
BROWN, MONZIONE, FABRO, ZAKARIA
& SCARLETT
900 Montgomery Street
San Francisco, Calif. 94133

Jeffrey Smyth

ADOLPH & SMYTH
Columbia Seafirst Center
701 First Avenue, 71st Floor
Seattle, Wash. 98104

Melvyn I. Weiss
MILBEG, WEISS, BERSHAD, HYNES & LERACH
One Pennsylvania Plaza
New York, N.Y. 10119

The court's previous orders with respect to the appointment and duties of Liaison Counsel, Co-Lead Counsel, and Lead Trial Counsel shall remain in place and apply to the mandatory punitive damages class.

Pursuant to Rule 23(c)(1), Federal Rules of Civil Procedure, this final approval and certification is conditional for the reason that there is presently pending an appeal by certain of the plaintiffs who believe that they are entitled to a remand of their claims to the Superior Court for the State of Alaska. This court denied such a remand. In the event that the latter decision should be reversed, the court would expect to re-examine the appropriateness of this certification.

Certain of the class representatives listed in Exhibit A (those identified with an asterisk) are among the plaintiffs seeking remand of their claims to the Superior Court. In the event that this court's decision denying remand is reversed as to such plaintiffs, they shall automatically cease to be class representatives, except upon their filing in this court a waiver of any right to remand to the Superior Court, in which case they shall be entitled to continue as class representatives.[2]

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[2] Following the hearing on April 8, the court asked counsel for defendants and Co-Lead Counsel for plaintiffs to agree upon a list of class representatives. The court is advised that Exhibit A reflects the result of that agreement, and that the condition stated in the text of this order with respect to class

Pursuant to Rule 2(c)(4)(A), Federal Rules of Civil Procedure, this certification is limited to the issues of:

(1) whether Exxon and/or Exxon Shipping are liable to members of the class, or any of them, for punitive damages, and

(2) if so, what amount of punitive damages should be assessed.

ENTERED: 4/14/94

/s/
H. RUSSEL HOLLAND
United States District Judge

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representatives who still seek remand is acceptable to those class representatives and to plaintiffs.

## CLASS REPRESENTATIVES
## (EXHIBIT A)

| Name | Plaintiff No. |
|---|---|
| Alaska Sport Fishing Ass'n | 139 |
| Alber, Louie E.* | 1761 |
| Artuner, Ahmet | 1601 |
| Baker, Grant C. | 40 |
| Bailey, Jeffrey | 828/4447 |
| Bennett, William | 1412 |
| Bullock, Michael Wayne | 1195 |
| Butler, Robyne L. | 41 |
| Carroll, Albert Ray* | 1997* |
| DEBRA LEE, Inc. | 39 |
| Dew Drop, Inc. | 38 |
| Dooley, Larry L.* | 79* |
| Doumit, Mark | 302 |
| Doumit, Steve | 303 |
| Jensen, Douglas R. | 34 |
| Johnson, Dennis G. | 1215 |
| Kompkoff, Donald P., Sr. | 114 |
| Kopecky, Josef | 1405 |
| Lowell, Daniel | 35 |
| Martusheff, Andrean E. | 1366 |
| Maxwell, Carol Ann | 166 |
| Maxwell, Jacquelan Jill | 1194 |
| Maxwell, Robert A. Sr. | 165 |
| McLenaghan, Michael* | 2946* |
| McMullen, Elenore E.* | 290* |
| Meredith, Leslie R.* | 3928* |
| Native Village of Tatitlek | 116 |
| Ogle, Leonard S. | 1375 |
| Olsen, Steven T. | 22 |
| Pederson, August M., Jr. | 246 |
| Redmond, Mary Lou | 1292 |
| Stanton, Joseph David | 1231 |
| Tisdall, Jean A. | 1387 |
| Wood, Darrell | 1316 |

COOK INLET PROCESSING
a Division of Polar Equipment, Inc.
Partial Release

1. FOR AND IN CONSIDERATION of the sum of TWO MILLION, EIGHT HUNDRED FIFTY THOUSAND AND 00/100 ($2,850,000.00) paid to the undersigned, Cook Inlet Processing, a division of Polar Equipment, Inc., ("Cook Inlet Processing'), a corporation organized pursuant to the laws of the State of Alaska, receipt of which is hereby acknowledged, and further acknowledging previous payments totaling $750,000.00, and in further consideration of the confidentiality, costs and fees letter of even date herewith, and attached hereto, for a cumulative payment amount of $3,600,000.00, and intending to be legally bound hereby, Cook Inlet Processing ABSOLUTELY AND IRREVOCABLY RELEASES AND DISCHARGES Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, their directors, officers, employees and agents, and the M/V EXXON VALDEZ, its officers and crew (hereinafter collectively referred to as "Exxon"), from all claims, demands and causes of action of every kind and character (whether known or unknown, or yet to occur), for all damages, costs, expenses, fees and all other injuries incurred during the calendar year 1989 and during 1990 up to the date of execution of this Partial Release (or which are incurred thereafter but relate to Cook Inlet Processing's operations and business activities during the calendar year 1989 and during 1990 up to the date of execution of this Partial Release),and all punitive damages of any kind arising at any time, that (a) are associated with or arise from the incident involving the M/V EXXON VALDEZ on March 23-24, 1989, (b) arise out of any and all oil-containment or cleanup procedures that preceded or followed the incident involving the M/V EXXON VALDEZ, or (c) are based on representations made at any time prior to or during the course of any oil spill response procedures. The sum stated above is accepted by Cook Inlet Processing in full settlement of the claims described above. The undersigned understands that this sum was agreed upon in a compromise settlement and is not an admission of liability by any party.

2. In further consideration of the payment stated above, Cook Inlet Processing hereby assigns, sells, transfers and subrogates to Exxon Corporation, without limitation, any and all rights, claims, interests and causes of action, known or unknown, for Exxon Corporation's own use and benefit, that Cook Inlet Processing has or may have, in respect to the claims described in paragraph 1 above, including punitive damage claims, against any person or corporation other than Exxon, or any governmental agency, including any liability fund that may be available for payment of damage claims. By so doing, Cook Inlet Processing gives Exxon Corporation full power and authority, for Exxon Corporation's own use and benefit, and on such terms and conditions as Exxon Corporation may deem reasonable in the exercise of its sole discretion, to litigation, compromise, settle or otherwise dispose of, in the name of Cook Inlet Processing or otherwise, the claims assigned herein, including the power and authority to release and discharge in the name of Cook Inlet Processing or otherwise, any persons, corporations or governmental agencies.

3. In further consideration of the payment stated above, in the event the assignment of any or all of the rights, claims, interests and causes of action by Cook Inlet Processing to Exxon Corporation in paragraph 2 above shall be found for any reason to be invalid, ineffective, or unenforceable, then and only then, and only to the extent that the assignment is found to be invalid, ineffective or unenforceable, Cook Inlet Processing in the alternative hereby covenants and agrees not to execute or to seek to enforce any judgment against any party for any such right, claim, interest, or cause of action which was sought to be assigned by Cook Inlet Processing to Exxon in paragraph 2 above.

4. In further consideration of the payment stated above, Cook Inlet Processing agrees that this Partial Release hereby supersedes the Funds Receipt and Claims Credit forms executed on August 29, 1989, October 16, 1989, and March 9, 1990.

Executed this 22nd day of May, 1990.

COOK INLET PROCESSING, INC.
A division of Polar Equipment, Inc.

/s/
Witness

/s/
Signature

Howard M. Baker
Printed Name

President, Polar Equipment, Inc.

/s/
Witness

/s/
Signature

Mike Shupe
Printed Name

Secretary, Polar Equipment, Inc.

Corporate Seal

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | |
|---|---|
| COOK INLET PROCESSING, a division of Polar Equipment, Inc., an Alaska corporation, | ) |
| Plaintiff, | ) |
| vs. | ) |
| EXXON CORPORATION, EXXON COMPANY USA, and EXXON SHIPPING COMPANY, | ) |
| Defendants. | ) |

Case No. 3AN-91-2445 Civil

**COMPLAINT**

COMES NOW the plaintiff, Cook Inlet Processing, a division of Polar Equipment, Inc. ("CIP"), by and through its attorneys of record, Birch, Horton, Bittner and Cherot, and for its Complaint hereby states and alleges as follows:

1.

Plaintiff CIP is a division of Polar Equipment, Inc., an Alaska corporation. CIP maintains offices in Nikiska, Kodiak and Anchorage, Alaska. Polar Equipment, Inc. has paid its biennial corporation tax last due and filed its biennial report for the last reporting period and is fully entitled to maintain this action.

2.

Exxon Shipping Company and/or Exxon Company USA and/or Exxon Corporation is the owner of the M/V Exxon Valdez which spilled millions of gallons of crude oil into Prince William Sound, Alaska on March 24, 1989 and thereafter ("Exxon oil spill"). Exxon Company USA and/or Exxon Corporation was the owner of the oil aboard the Exxon Valdez. Defendants Exxon Shipping Company, Exxon Company USA, and Exxon Corporation are liable to plaintiff for damages resulting from the Exxon oil spill under the laws of the state of Alaska and other applicable law.

3.

Plaintiff suffered damages as a result of the Exxon oil spill. After negotiations with defendants, in May, 1990, defendants paid plaintiff valuable consideration and plaintiff executed a partial release in favor of defendants and others for all damages suffered by plaintiff through approximately May, 1990. By agreement of plaintiff and defendants, however, plaintiff did not release defendants for any damages suffered by plaintiff after May, 1990.

4.

At some future time, the return of salmon or other fish to the Upper Cook Inlet, Kodiak, or Prince William Sound fisheries in the state of Alaska may be adversely affected as a direct or proximate result of the Exxon oil spill, which would cause plaintiff damage. Or plaintiff may suffer some damages at a future date as a result of the Exxon oil spill. Plaintiff is entitled to a declaratory judgment that should such damage occur in the future, plaintiff may bring an action against the defendant to recover for such damages to be incurred in the future. In the alternative, plaintiff is entitled to damages from defendants in an amount in excess of $50,000 to compensate plaintiff for damages to be incurred in the future as a result of the Exxon oil spill.

Wherefore, plaintiff prays for the following relief:

1. That this court enter a declaratory judgment to the effect that should plaintiff incur some damage in the future from the Exxon Valdez oil spill, plaintiff is not barred by the statute of limitations from bringing such action against defendants at such dates in the future as the court may determine;

2. In the alternative, that judgment be entered in favor of plaintiff against defendants, jointly and severally, in an amount in excess of $50,000 to compensate plaintiff for the future damages to be sustained by plaintiff;

3. That the court award plaintiff prejudgment interest, costs, and Rule 82 attorney fees;

4. That the court award such further relief as it deems just and equitable.

DATED this 26th day of March, 1991, at Anchorage, Alaska.

BIRCH, HORTON, BITTNER
and CHEROT
Attorneys for Plaintiff

By: /S/
Peter A. Galbraith

## AGREEMENT AMONG COUNSEL REGARDING JOINT PROSECUTION, SETTLEMENT, AND DAMAGES ALLOCATION AGREEMENT

1. This agreement is entered into among counsel representing all or virtually all plaintiffs whose claims have been asserted in the consolidated Exxon Valdez Oil Spill Litigation in the United States District Court for the District of Alaska (In Re the Exxon Valdez, Case No. A89-095-CV (HRH)) and the Superior Court for the State of Alaska (In re Exxon Valdez Oil Spill Litigation, Case No. 3AN-89-2533 Civil), for the purpose of maximizing the recovery from Exxon on behalf of all plaintiffs.

2. It is agreed by and among the undersigned counsel as follows:

A. All recoveries from defendants by any Signatory Plaintiff or group of Signatory Plaintiffs, whether by settlement or trial, will be shared among Signatory Plaintiffs in accordance with the allocation matrix attached hereto as Attachment 1 (including any revisions pursuant to paragraph B below).

B. The Allocation Committee and the casewide Executive Committee appointed by the presiding judges in federal and state court pursuant to Pretrial Order Nos. 6 (state) and 9 (federal) may approve revisions to Attachment 1 which do not reduce the aggregate allocated share of any group of Signatory Plaintiffs identified in Attachment 1 below that percentage share of the aggregate allocated share set forth for such plaintiff group in Attachment 2. In the event that this Joint Prosecution, Settlement, and Damages Allocation Agreement is submitted to a court for approval in connection with either the continuing litigation or a settlement agreement in the consolidated Exxon Valdez Oil Spill Litigation identified above and the court's approval is conditioned on a change in the aggregate allocated share of a plaintiff group which reduces the percentage share of the aggregate allocated share for such plaintiff group below that percentage share of such plaintiff group set forth in

Attachment 2, then the adversely affected plaintiff group shall have the right to withdraw from this agreement.

C. *The undersigned* counsel will use their best efforts to persuade any court which presides over the distribution of recoveries referred to in paragraph 1 above, to abide by this agreement and the reasonable terms of any settlement agreement with the defendants, and will refrain from taking any action to undermine the implementation of this agreement or to challenge its fairness and appropriateness.

D. This agreement supercedes the Joint Prosecution, Settlement, and Damages Allocation Agreement executed by plaintiffs' counsel in or about July 1994.

3. This agreement may be executed in several counterparts and by facsimile and, as executed, shall constitute one agreement, binding on all Signatory Plaintiffs hereto, even though all Signatory Plaintiffs do not sign the original or the same counterpart.

Brian O'Neill Dated: 4/18, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

_____ Dated: _____, 1995.

## ATTACHMENT 1

## CURRENT ALLOCATED AND "FLOOR" SHARES OF EXXON RECOVERIES

| | |
|---|---|
| Case Fund | 2.83% |
| Non-Signatories' Share | 5.00% |
| Signatories' Share | 92.17% |

| **Signatory Plaintiffs** | **Current Share Signatories' Share** | **"Floor" Share of Signatories' Share*** |
|---|---|---|
| FISHERIES | | |
| Oiled | 77.21% | 77.21% |
| Unoiled | 2.31% | 2.31% |
| Tenders | 0.64% | 0.64% |
| **Fisheries Total** | 80.16% | 80.16% |
| AQUACULTURE ASSN'S | 2.12% | 1.91% |
| BUSINESSES | 0.31% | 0.28% |
| CANNERY WORKERS | 0.59% | 0.53% |
| LANDOWNERS | 3.95% | 3.56% |
| MUNICIPALITIES | 2.42% | 2.18% |
| NATIVES | 7.37% | 6.64% |
| NATIVE CORPORATIONS | 0.73% | 0.65% |
| PROCESSORS | 2.33% | 2.10% |
| RECREATIONAL USE | 0.01% | 0.01% |
| **GRAND TOTAL** | **100%** | **98.02%** |

*"Floor" share equals 90% for non-fishing plaintiffs.

## ATTACHMENT 2

| | **% SHARE** |
|---|---|
| FISHERIES | 80.16% |

| | |
|---|---|
| AQUACULTURE ASSOCIATIONS | 1.91% |
| BUSINESSES | 0.28% |
| CANNERY WORKERS | 0.53% |
| LANDOWNERS | 3.56% |
| MUNICIPALITIES | 2.18% |
| NATIVES | 6.64% |
| NATIVE CORPORATIONS | 0.65% |
| PROCESSORS | 2.10% |
| RECREATIONAL USE | 0.01% |
| **GRAND TOTAL** | **98.02%** |

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Liaison Counsel for Plaintiffs

Honorable H. Russel Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| In re: | ) |
| | ) Case No. A89-095- |
| The EXXON VALDEZ | ) CV (HRH) |
| | ) (Consolidated) |
| | ) |
| THIS DOCUMENT RELATES TO ALL CASES | ) |
| | ) |

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTION OF PLAINTIFFS AND DEFENDANTS FOR PRELIMINARY APPROVAL OF PHASE IV SETTLEMENT, PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PLAN OF ALLOCATION OF RECOVERIES OBTAINED BY PLAINTIFFS IN LITIGATION ARISING FROM THE EXXON VALDEZ OIL SPILL, AND THE ORDERS REQUESTED IN THOSE MOTIONS SCHEDULING A**

**HEARING ON FINAL APPROVAL OF THE PHASE IV SETTLEMENT AND PLAN OF ALLOCATION, AND AUTHORIZING NOTICE TO CLASS MEMBERS**

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## I. INTRODUCTION

Plaintiffs are pleased to inform the Court that, through agreement with Exxon on the Phase IV Settlement and among plaintiffs on the Plan of Allocation, virtually all the claims pending before the Court in this consolidated litigation are now ready for resolution. The Phase IV Settlement will dispose of all remaining compensatory damage claims, other than the claims of a handful of pro per plaintiffs. The Plan of Allocation will determine, by a percentage share formula, the amount each category of claimants will recover on all federal or state court claims arising out of the Exxon Valdez oil spill, regardless of whether the claims involve compensatory or punitive damages, and regardless of whether the funds involved already have been recovered or may be recovered in the future.[1]

In consequence, plaintiffs believe that upon final approval of the Phase IV Settlement and Plan of Allocation, it will be appropriate for the Court to enter a final judgment permitting appeal of the punitive damage verdict and other matters which must be resolved by the Ninth Circuit before this almost seven-year-old litigation can be concluded. Simultaneous with the process of seeking the Court's approval of the Phase IV Settlement and the Plan of Allocation, plaintiffs also will seek the entry of final judgment in these cases.

Plaintiffs ask the Court to preliminarily approve the Phase IV Settlement so that notice of a hearing on final approval can be provided to the class members. The settlement agreement provides for dismissal of virtually all Phase IV compensatory damage claims remaining in this Court for a total settlement consideration of $3,507,981.

---

[1] The Phase IV Settlement Agreement and the Plan of Allocation have been filed with the Court and, in addition, are Exhibits A and D, respectively, to the Affidavit of David W. Oesting being filed herewith.

Offsets from prior payments to claimants will result in a lack of any cash payment from Exxon to the settling plaintiffs specifically with respect to the Phase IV claims. Nevertheless, the settlement agreement is fair, reasonable and adequate.

The decision to settle rather than try the Phase IV claims will greatly expedite appellate resolution of the issue on which all plaintiffs have the greatest interest – the status of the more than $5 billion verdict for punitive damages.

Furthermore, by conditioning their acceptance of the Phase IV Settlement on Court approval of the Plan of Allocation, the Phase IV plaintiffs have traded off the risk and delay inherent in the Phase IV trial for a guaranteed participation in recoveries that are ready for distribution, and participation in the punitive and compensatory damage awards if they are sustained on appeal. Many decisions hold that a court will not second guess the decision of informed, expert counsel that their clients' interests are well served by giving up claims of uncertain value for a guaranteed participation in a settlement fund.[2] In this case, counsel's judgment is confirmed by the agreement of substantially all Phase IV direct action plaintiffs in addition to the class representatives.

Since the Phase IV Settlement contemplates approval of the Plan of Allocation, that Plan is the linchpin of plaintiffs' efforts to finally resolve all the claims before the Court. Plaintiffs submit that the Plan is eminently fair and reasonable, and should be preliminarily approved by the Court for the purpose of giving notice to the affected class members.

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[2] See, e.g., Class v. City of Seattle, 955 F.2d 1268, 1287-8 (9th Cir. 1991), cert. denied sub nom., Hoffer v. City of Seattle, _U.S. _, 113 S.Ct. 408 (1992); In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 221 (5th Cir. 1981). See also, In re Chicken Antitrust Litigation, 669 F.2d 228, 238 (5th Cir. 1982).

The Plan is predicated upon a joint prosecution agreement which was entered into by all but a few of the individual plaintiffs in the litigation prior to commencement of Phase II of the trial, together with a further joint prosecution agreement also signed on behalf of virtually all plaintiffs in the Spring of 1995. Over a period of more than two years, the Plan of Allocation was developed and refined by an Allocation Committee of plaintiffs' counsel, working in conjunction with plaintiffs' Executive Committee. Together those counsel represent every category of claimant affected by the Plan. They organized and conducted an intense process of information gathering and arm's-length negotiations among plaintiffs' counsel which ultimately culminated in the Plan In its final form, the Plan of Allocation has been approved by plaintiffs' Lead Counsel and Casewide Executive Committee, and has been agreed to by all class representatives and all direct action plaintiffs in both the federal and state court consolidated litigations, except for a few individual plaintiffs.[3]

In support of these motions, plaintiffs are filing an Affidavit of David W. Oesting (the "Oesting Affidavit"), Co-Lead Counsel for plaintiffs and a member of the Allocation and Executive Committees. That Affidavit describes the historical genesis of the Plan of Allocation, the make up of the Allocation Committee, the information which the Committee obtained and considered, the criteria which it employed, the procedures it followed, and the conclusions which it reached. In addition, the Plan of Allocation itself describes in great detail the various claim categories and the methodology and bases upon which recoveries will be allocated among claim categories pursuant to the Plan.

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[3] The Plan provides that the allocable share (as determined by the Court) of those few individual plaintiffs who have not agreed to be bound by the Plan of Allocation would be taken "off the top" and thus would not require any change in the percentage share allocation applicable to signatories.

For the reasons given below and in the Oesting Affidavit, the Court should preliminarily approve the Phase IV Settlement and the Plan of Allocation and should enter an order providing for dissemination to the class members of notice of those agreements and of the court hearing with respect to final approval.

## RELEVANT FACTS

### A. The Phase IV Settlement

In Phase IV, the parties were scheduled to try the compensatory claims of commercial fishermen whose claims were not tried as a part of Phase IIA, Native Alaskans who had opted out of the Native Class Settlement, Landowners, certain Native Corporations and others.[4] Virtually all these "Phase IV" plaintiffs have agreed to settle their untried claims against the Exxon defendants,[5] conditioned upon judicial approval of the Plan of Allocation.

The Phase IV plaintiffs whose claims are resolved pursuant to the settlement include both direct action plaintiffs and members of the Commercial Fishing Class, the Native Class, and the Landowner Class. Of course, all the Phase IV plaintiffs are members of the Mandatory Punitive Damages Class as well.

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[4] A great variety of the different claims were slated for trial, including, for example, commercial salmon fishermen in Lower Cook Inlet; commercial fishermen in "oiled" areas who harvested species other than salmon and herring; commercial fishermen who sold permits or vessels after September 1993; personal injury plaintiffs; aquaculture associations in "oiled" areas and municipalities.

[5] As discussed below, the only non-participating Phase IV plaintiffs who have not already resolved their Phase IV claims in separate settlements are the "Seattle Seven" processors and five pro per plaintiffs.

The Phase IV Settlement Agreement provides for the dismissal with prejudice of all Phase IV compensatory damage claims remaining in this Court for a total of $3,507.981.[6] Exxon is entitled to offset against the Phase IV Settlement previous payments to plaintiffs from the Alyeska settlement, Exxon Claims program, and TAPL Fund. As a result of these offsets, there will be a zero net recovery.

While the Phase IV Settlement will not, in itself, provide a cash fund for distribution to the settling plaintiffs, the rationale supporting that settlement is sound. Trying the Phase IV claims would be complex, time consuming, and expensive, and would significantly delay the point at which all plaintiffs could obtain entry of final judgment and final determination on appeal of their right to recover the punitive damages awarded by the jury, in which recovery the Phase IV plaintiffs will share.[7]

Furthermore, there were substantial risks and uncertainties concerning the ultimate outcome of these various claims at trial. For each of the Phase IV categories, Exxon stated that it would present evidence and argument that the claimants had incurred little or no damage from the oil spill, and that any damage that had occurred had already been compensated. While plaintiffs would have presented evidence in support of their claims, the risks and uncertainty with respect to the ultimate outcome at trial was evident to plaintiffs' counsel and further confirmed the wisdom of accepting the Phase IV Settlement and moving forward much

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[6] The Phase IV Settlement does not bar the settling plaintiffs from appealing the Court's summary judgment rulings, seeking remand to state court, or pursuing claims foreclosed by the Court which the Ninth Circuit or state court may allow.

[7] Among other things, in light of an issue as to whether interest runs on the punitive damage verdict prior to final judgment, plaintiffs' counsel were concerned that delay in entry of a final judgment might cost plaintiffs over $268 million per year in lost interest.

more quickly to obtain an appellate determination on the punitive damage verdict and other important matters.

The Phase IV plaintiffs have reserved the right to withdraw from the Phase IV Settlement if the Plan of Allocation is not approved. Consequently, the Phase IV Settlement represents a very rational tradeoff of uncertain Phase IV Claims for the greater benefit of inclusion in the Plan of Allocation, under which the Phase IV plaintiffs are already guaranteed participation in recoveries which are presently in hand, as well as a fair percentage of aggregate future recoveries for punitive and compensatory damages.

An important consideration leading the Phase IV plaintiffs to settle on these terms was the belief that resolving the Phase IV claims by settlement would significantly expedite the point in time at which the Court would enter a final judgment enabling the parties to proceed with appellate review of the punitive damages verdict and other issues.

As a result of the Phase IV Settlement, virtually all the compensatory damage claims presented in this consolidated litigation have now been resolved in this Court. The settlement applies to all plaintiffs and class members who were scheduled to participate in Phase IV except for (a) the native opt-outs;[8] (b) the "Seattle Seven" seafood processors and related entities, which previously settled and released their claims against Exxon and subsequently brought a second suit for damages allegedly not encompassed in their

---

[8] These include approximately 717 Natives falling within the Native Class definition who opted out of the Native Class. On October 12, 1995, these "direct action" Natives settled their claims for the commodity value of lost subsistence harvest against the Exxon defendants. On October 27, 1995, the Court granted preliminary approval of that settlement, authorized notice of the settlement, and scheduled a fairness hearing for January 19, 1996.

first action; [9] and (c) certain plaintiffs in pro per, i.e., Tom LaKosh, Daniel DeNardo, Donald Ferguson, Rainbow King Lodge, and W. Findlay Abbott.

Even the above short list of exclusions from the Phase IV Settlement understates the extent to which that settlement effectively eliminates all but a handful of compensatory damage claims remaining in this Court. The Court has already given preliminary approval to the Native opt-Out settlement, and that group of plaintiffs has agreed to participate in the Plan of Allocation. The "Seattle Seven" seafood processors group separately settled the claims which they initially brought. Furthermore, under the law of the case, the seafood processors have no viable claim for compensatory damages in light of the Court's ruling in Order No. 174, Clerk's Docket No. 4444, that Robins Dry Dock precludes such claims (subject, of course, to their right to pursue this issue on appeal).

This leaves only five pro per plaintiffs in a posture where their compensatory damage claims still need to be resolved. Plaintiffs believe those claims to be de minimus, and submit that those claims should not stand in the way of entry of final judgment allowing an appeal to proceed on the punitive damage and other issues.

**B. The Plan of Allocation**

**1. Genesis of The Plan of Allocation: The Joint Prosecution Agreement**

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[9] That group of plaintiffs includes Icycle [sic] Seafoods, Inc.; Astoria Warehousing, Inc.; Peter Pan Seafoods, Inc.; Peninsula Salmon, Inc.; Seven Seas Corporation; Stellar Seafoods, Inc.; Washington Fish & Oyster Company; Ocean Beauty Alaska, Inc.; Portland Fish Group, Inc.; Wards Cove Packing Company; Alaska Boat Company; and North Pacific Processors, Inc.

As plaintiffs' counsel prepared for trial in 1993, plaintiffs' court-appointed, Casewide Executive Committee concluded that it was essential to uncouple allocation of recoveries from the fortunes of individual plaintiffs at trial. This was the only way to ensure a unified effort by the myriad plaintiffs towards their common goal of maximizing total recoveries.

Plaintiffs' optimal trial strategy was to present the jury a focused, hard-hitting case emphasizing the defendants' reckless wrongdoing and overall harm to the people, economy and environment of Alaska. The Executive Committee elected to try before a single jury the punitive damage cases against the defendants, and compensatory damage cases of Native communities injured by the oil spill, and salmon and hearing fishermen in the worst-affected "oiled" fishing areas – Chignik, Upper Cook Inlet, Kodiak and Prince William Sound. Compensatory damage cases of other federal court plaintiffs were slated for later trial phases.

Development of a "joint prosecution agreement" under which plaintiffs would pool all recoveries in the consolidated litigation and share those recoveries on a fair and reasonable basis was a crucial part of the process that enabled plaintiffs to proceed with such a practical, effective trial plan, which subordinated the interests of each group of plaintiffs to the collective interests of all.

After extensive negotiations and discussions, in July 1994, counsel representing virtually all plaintiffs whose claims have been asserted in the federal and state court Exxon Valdez Oil Spill Litigation signed a document entitled "Joint Prosecution, Settlement, And Damages Allocation Agreement" (hereafter the "Initial Joint Prosecution Agreement') (Exhibit F to the Oesting Affidavit). That Agreement confirmed an oral agreement which had been reached by plaintiffs' counsel prior to the commencement of Phase IIA of the trial. The agreement provided that all recoveries by any plaintiff or group of plaintiffs, whether by settlement or trial, would be shared among all plaintiffs in accordance with an allocation matrix attached to that

document.[10] The Initial Joint Prosecution Agreement further provided that the undersigned counsel would use their best efforts to persuade their clients (and any court which presided over the distribution of such recoveries) to approve the agreement.

Subsequent to execution of the Initial Joint Prosecution Agreement, all the signatory counsel confirmed to plaintiffs' Co-Lead Counsel that their clients agreed in principle with the Initial Joint Prosecution Agreement.

During the spring of 1995, while negotiations on a possible Phase IV Settlement were underway, the Initial Joint Prosecution Agreement was modified and superseded by an "Agreement Among Counsel Regarding Joint Prosecution, Settlement, And Damages Allocation Agreement" (the "Joint Prosecution Agreement") (Exhibit G to the Oesting Affidavit). That document was signed by counsel representing virtually all plaintiffs whose claims have been asserted in the consolidated litigation in federal or state court. Consistent with the Initial Joint Prosecution Agreement, it provided that all recoveries by any signatory plaintiff or plaintiff group, whether by settlement or trial, would be shared among signatory plaintiffs in accordance with the allocation matrix attached to that document as Attachment 1. That allocation matrix reflected preliminary damage estimates for the various Claim Categories based upon the information which was then available. All parties to the agreement recognized that the damage estimates and percentage shares reflected in the matrix were subject to refinement based on information which had not yet been received or developed. Consequently, the Joint Prosecution Agreement expressly authorized the Allocation Committee and the Casewide Executive Committee to approve revisions of the allocation matrix set forth in Attachment 1, so long as those revisions did not reduce the aggregate allocated share

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[10] Plaintiffs would be entitled to participate under the matrix without regard to whether their claims had been dismissed and were subject to appeal at the time of payment.

of any group of signatory plaintiffs below a "floor" percentage set forth for that group in Attachment 2 to the Joint Prosecution Agreement.[11]

The matrix revisions contemplated by the Joint Prosecution Agreement were made by the Allocation Committee, have been agreed to by plaintiffs' counsel, and are reflected in the Plan of Allocation presented here for Court approval.[12]

The Joint Prosecution Agreement is, of course, a binding contractual agreement among its signatories. The parties to that agreement gave up their right to keep for themselves whatever damages would be recovered on their own claims. In return, they received ample consideration in the form of the payments which will be forthcoming to each signatory and class member under the Plan of Allocation. In addition, the signatories also benefited from the Joint Prosecution Agreement through the enhanced ability of plaintiffs' counsel to present a concise, effective case at trial which focused on the strongest of plaintiffs' claims.

Insofar as the signatories include representatives of certified classes, the Joint Prosecution Agreement is binding upon the absent class members subject to approval of the Court. In substance, that approval will be rendered if the Court approves the Plan of Allocation, since the signatory

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[11] Specifically, the Joint Prosecution Agreement sets forth "floor" shares below which matrix shares of major Claim Categories (i.e., all Claim Categories except for individual commercial fisheries) could not fall. These floor shares equaled 90% of each Claim Category's matrix share based on matrix damage quantified as of April 1995. The certainty afforded by the floor shares was necessary to obtain consent for settlement of the Phase IV federal court claims.

[12] The Plan of Allocation does not reduce the allocated share of any group of signatory plaintiffs below their applicable "floor".

plaintiffs agreed to be bound by that Plan in the Joint Prosecution Agreement.

## 2. The Plan of Allocation

### (a) Development of An Overall Approach To Allocation

After extensive discussions, plaintiffs' counsel concluded that the most equitable way to allocate recoveries among plaintiff groups, both punitive and compensatory damages, was in proportion to plaintiffs' quantified damages as fairly determined by plaintiffs themselves. Plaintiffs' counsel also agreed that it was fair to include, at a discount, claims by plaintiffs who had in fact suffered loss as a result of the spill, but whose claims had been dismissed for lack of legal causation. These dismissed plaintiffs had rights of appeal, and many had made large contributions to the prosecution of the litigation.

Alternative schemes for allocation of punitive damage recoveries were considered and rejected as less fair. For example, per capital distribution among all plaintiffs would not fairly reflect the weight of the harm caused by the spill, given its huge geographic reach and the widely disparate types and degrees of loss. Allocation on the basis of jury verdicts would unfairly force small groups of plaintiffs (like a single fishery or Native community) to bear the entire risk of adverse trial results in their particular cases, most of which, uncoupled from the Phase I and III trials, would not have had the benefit of a jury that had considered evidence of liability for punitive damages as well as evidence of compensatory damages.

Before the actual recoveries were known, it was impossible to determine what plaintiffs' absolute dollars shares would be under a plan of allocation. However, percentage shares of ultimate recoveries could be derived, at least for broad categories of plaintiffs. Consequently, plaintiffs' counsel agreed to construct a "Damage Matrix" for broad categories of damage claims ("Claim Categories").

It was agreed that for each Claim Category, "Matrix Damages" would be determined by quantifying actual damages suffered as a proximate result of the Exxon Valdez oil spill, and discounting them for litigation risk. Each Claim Category's "Matrix Share" would be calculated as the ratio, expressed as a percentage, of the claim Category Matrix Damages to the sum total of all Claim Categories' Matrix Damages. Each Claim Category's share would be derived by applying its Matrix Share to all recoveries including punitive and compensatory damages, whether obtained from the Exxon Defendants, Alyeska defendants, or Trans Alaska Pipeline Liability ("TAPL") Fund.

Consistent with that approach, the Plan of Allocation applies the Matrix Shares not only to the Native and municipality settlement funds now in hand, but to all future recoveries in the federal and state litigations as well. Upon judicial approval of the Plan of Allocation, the settling Natives and municipalities will make available their settlements for distribution among all plaintiffs, plaintiffs with Phase IV claims will give final consent to the settlement of their claims, and this litigation will be in a position to proceed to the appellate stage.

### (b) Claim Categories

In developing the Plan of Allocation, the plaintiffs' claims were divided into the following categories: Commercial Fisheries (with numerous subdivisions based on fishery and gear type), Aquaculture Associations, Area Businesses, Cannery Workers, Municipalities, Alaska natives, Alaska Native Corporations, Personal Injury, Personal Property, Processors, Real Property, Recreational Users, Subsistence Users, and Tenders.

Many individual plaintiffs have claims falling into more than one of the categories. The Plan of Allocation specifically addresses areas of overlap in order to avoid double counting of matrix damages. Where an issue might exist as to the applicable claim category for a particular form

of damage, the Plan specifies the claim category involved. On the other hand, where the same Claimant has damages falling within different claim categories (hence no double counting would be involved), the claimant can participate separately within each of the applicable claim categories.

### (C) The Damage Matrix

#### (i) Process Followed In Developing The Damage Matrix

Plaintiffs' court-appointed Co-Lead Counsel and Executive Committee have overseen the design and construction of the Damage Matrix, and appointed an Allocation Committee, comprised of direct and class action counsel, to fairly and consistently quantify Matrix Damages and determine Matrix Shares.

As described in the Oesting Affidavit, the Allocation Committee began its work on April 1, 1993. Since then it has been actively involved in planning and organizing the work necessary to formulate an intelligent and fair allocation plan, obtaining and reviewing pertinent data, working up initial valuations of claim category damages, circulating those initial valuations, engaging in extensive discussions with interested persons concerning those valuations, and finalizing the valuations in the Damage Matrix. In addition, the Committee has been working throughout its existence to assure that all or virtually all the plaintiffs involved in the consolidated federal and state court litigations understood and would agree to participate in the plan.

The Allocation Committee reviewed extensive information submitted by counsel on behalf of their clients, as well as trial proof, expert studies, TAPL Fund reports, data and reports from agencies of the State of Alaska, claims data submitted in connection with the Alyeska Settlement, and other information The Committee has consulted with direct action plaintiffs, class representatives, other individual plaintiffs, adhoc committees of plaintiffs, and plaintiffs' counsel. Strict quality control standards and consistent

methodologies have been applied. Expertise of counsel has been relied upon to set realistic discount factors to account for litigation risk. In short, all reasonable efforts have been made to base Matrix Damages and Matrix Shares on the best available information.

The Oesting Affidavit confirms that, among themselves, the members of the Allocation Committee and the Executive Committee represent every category of claimant covered by the Plan, and that the interests of each plaintiffs' group were represented vigorously and effectively through arm's-length discussions and negotiations by the members of the Allocation Committee. Reasonable consideration has been given to all the positions and claims of the various categories of claimants, and the work of the Committee was not tainted by any conflict of interest. In consequence the outcome of the Committee's work is a fair and balanced allocation program. See generally, Oesting Affidavit ¶¶ 31-43.

The responsible manner in which the Allocation Committee, Lead Counsel and the Casewide Executive Committee went about formulating and implementing a plan of allocation is further confirmed by the fact that virtually all plaintiffs who have brought claims in the consolidated litigation have agreed to join in the Plan. Clearly, the Plan of Allocation has been designed to provide fair and reasonable treatment to all litigants while enormously expediting the completion of these consolidated proceedings.

**(ii) Claims Valuation**

As discussed above, plaintiffs' counsel concluded that the most equitable way to divide recoveries is in proportion to each Claim Category's reasonable compensatory damage claim as evaluated jointly by plaintiffs' counsel. The Plan of Allocation contains a detailed description of each of the Claim Categories, the types of plaintiffs and class members asserting such claims, and the bases on which damages were determined, including any discount for risk.

As one example of the approach taken in the Plan of Allocation to damage valuation, matrix damages for the Oiled Fishery Claim Categories include: income from commercial fishing operations lost as a result of diminished price or harvest; diminished value of limited-entry commercial fishing permits and fishing vessels; injury to quality of life and emotional stress; and repair and replacement of oiled vessels, nets, skiffs and other equipment. Non-economic damages of commercial fishermen and economic damages to the subsistence way of life of Native Alaskans are discounted by 50%, and permit and vessel devaluation losses are discounted by one-third. For a more detailed explanation, see Plan of Allocation at p. 14, n.23-24; p. 15, n.25.

As another example, matrix damages for the Real Property Claim Category are limited to loss in property value caused by the oil spill, plus expenses of protecting property from the spill, cleanup and restoration. Property devaluation losses are discounted by 50%, while costs of protection, cleanup and restoration are not discounted.[13] To qualify for inclusion in the Real Property Claim Category, a claim must derive from damage to real property which lies within "Oil-Affected Areas," defined generally as areas encompassed by the shaded portions of a map (attached to the Plan of Allocation) issued by the State of Alaska Department of Natural Resources. For a more detailed discussion, see Plan of Allocation, p. 25.

The above are merely two examples of the informed and balanced approach followed by the Allocation Committee in

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[13] Excluded from the Real Property Claim Category are claims for economic losses suffered by commercial enterprises operated on real property, which are included in the Claim category which is appropriate for the type of commercial operation. Also excluded from the Real Property Claim Category are claims for non-economic loss, such as emotional distress, hedonic damages, and invasion of privacy.

deriving fair and reasonable damage figures. The Plan itself spells out in great detail the criteria applied and the conclusions reached with respect to each of the many Claim Categories which it covers.

### (iii) Percentage Shares

In the Plan of Allocation, the damage figure for each Claim Category has been totaled, and then compared to the aggregate damage figure for all Claim Categories to determine the percentage of aggregate damages attributable to each Claim Category.[14] The percentage figure for each Claim Category constitutes the percentage of total recoveries in the litigation allocable to that Claim Category.

The percentage shares of each of the Claim Categories as set forth in the Plan of Allocation are as follows:

MATRIX SHARES

| CLAIM CATEGORY | |
|---|---|
| Aquaculture Associations | 1.91% |
| Businesses | 0.28% |
| Cannery Workers | 0.53% |
| Commercial Fisheries – Oiled | 78.73% |

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[14] At the time of the Alyeska settlement, the Court approved a plan of allocation for that settlement fund which was based on the information and experts' reports which were available at that time. In light of the additional information which subsequently became available, the Allocation Committee has adjusted many of the percentage shares allocated to Claim Categories in the Alyeska settlement matrix. Plaintiffs have been informed that if the percentage of total recoveries allocated to their category in the Plan of Allocation is different from the share they received in the Alyeska settlement, future distributions will be adjusted to provide them with an aggregate allocation (including the Alyeska payment) consistent with the Plan of Allocation.

| | |
|---|---|
| Commercial Fisheries – Unoiled | 2.31% |
| Municipalities | 2.18% |
| Natives | 6.64% |
| Native Corporations – Signatories | 0.65% |
| Personal Injury | 0.14% |
| Personal Property | 0.014% |
| Processors | 2.099% |
| Real Property | 3.558% |
| Recreational use | 0.008% |
| Subsistence | 0.008% |
| Tenders | 0.940% |
| GRAND TOTAL | 100.00% |

Within the categories of "Commercial Fisheries Oiled" and "Commercial Fisheries Un-Oiled," the Plan includes the following further breakdown for specific subsets of damage claims:

MATRIX SHARES OF OILED FISHERY CLAIM CATEGORIES

| | |
|---|---|
| CHIGNIK | |
| Salmon Seine | 4.96% |
| Area Total | 4.96% |
| COOK INLET | |
| Dungeness crab | 0.084% |
| Miscellaneous Finfish | 0.004% |
| Pot Shrimp | 0.015% |
| Roe Herring (Lower Cook Inlet only) | 0.294% |
| Salmon Drift | 15.2% |
| Salmon Seine | 2.32% |
| Salmon Set | 6.25% |
| Tanner crab | 0.136% |
| Area Total | 24.30% |
| KODIAK | |
| Dungeness Crab | 0.034% |

| | |
|---|---|
| Food Bait Herring | 0.033% |
| Miscellaneous Finfish | 0.029% |
| Miscellaneous Shellfish | 0.017% |
| Roe Herring Drift | 0.17% |
| Roe Herring Seine | 0.57% |
| Salmon Beach Seine | 0.24% |
| Salmon Seine | 14.5% |
| Salmon Set Net | 4.47% |
| Scallops | 0.015% |
| Area Total | 20.10% |

| | |
|---|---|
| PRINCE WILLIAM SOUND | |
| Dungeness Crab | 0.022% |
| Food Bait Herring | 0.102% |
| King Crab | 0.060% |
| 1989 Fund | 3.33% |
| Miscellaneous Finfish | 0.018% |
| Miscellaneous Shellfish | 0.003% |
| Pot Shrimp | 0.19% |
| Roe Herring Drift | 0.27% |
| Roe Herring Seine | 4.14% |
| Roe on Kelp Pounds | 2.20% |
| Sablefish | 0.015% |
| Salmon Drift | 6.35% |
| Salmon Seine | 11.75% |
| Salmon Set | 0.45% |
| Tanner Crab | 0.30% |
| Trawl Shrimp | 0.009% |
| Wild Roe on Kelp | 0.15% |
| Area Total | 29.40% |
| GRAND TOTAL | 78.73% |

MATRIX SHARES OF UNOILED FISHERY CLAIM CATEGORIES

| | |
|---|---|
| Bristol By Roe Herring | 0.036% |

| | |
|---|---|
| Bristol Bay Salmon | 1.32% |
| Cape Romanzoff Roe Herring | 0.0014% |
| Chignik Herring Seine | 0.00005% |
| Cook Inlet (Upper) Roe Herring | 0.0002% |
| Halibut | 0.0006% |
| Kotzebue Salmon | 0.0046% |
| Kuskokwim Roe Herring | 0.0027% |
| Kuskokwim Salmon | 0.225% |
| Lower Yukon Salmon | 0.0143% |
| Norton Sound Roe Herring | 0.0139% |
| Norton Sound Salmon | 0.0015% |
| Peninsular Aleutians Roe Herring | 0.0025% |
| Peninsular Aleutians Salmon | 0.369% |
| Southeast Roe Herring | 0.0160% |
| Southeast Salmon | 0.499% |
| Upper Yukon Salmon | 0.0021% |
| GRAND TOTAL | 2.31% |

### (d) Virtually All Plaintiffs Have Agreed To The Plan of Allocation

All individual plaintiffs and class representatives in the federal and state litigations have agreed to the Plan of Allocation in the form in which it is now presented to the Court for approval, except for a very few individual plaintiffs. Non-signatories include a handful of institutional plaintiffs who refused to participate in the Joint Prosecution Agreement, elected not to share their recoveries with other plaintiffs, and instead took their chances in separate trials – Chenega Corporation, Chugach Alaska Corporation, English Bay Corporation, Eyak Corporation, Port Graham Corporation and Tatitlek Corporation. Nor have three of the pro per plaintiffs agreed to participate.[15]

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[15] The Plan of Allocation does not apply to the "Seattle Seven" processors who settled their Exxon claims early in the litigation and who will not share in any recoveries except their own settlement.

In state court trials last summer, the non-signatory Native Corporations failed to obtain any net recovery. Nevertheless, it is proposed to allocate them 3% of punitive damage recoveries. This is a fair share commensurate with their Matrix Damages. Signatory plaintiffs will share in the remaining 97% of punitive damage recoveries, and all further compensatory damage recoveries.

It is appropriate for the Court to give final approval to the Plan of Allocation notwithstanding that a few individual plaintiffs have, to date, withheld agreement. The Plan of Allocation provides that any amounts awarded to nonsignatories will be taken "off the top", and the percentage shares of the various Claim Categories for which the Plan of Allocation provides will be applied to the aggregate amount of recoveries remaining after payment is made to those non-signatories.

### C. Distribution of Recoveries Among Plaintiffs And Class Members

The Plan of Allocation deals only with the formula for allocating recoveries among claimant groups. Within 90 days of approval of the Plan of Allocation, Co-Lead Counsel will submit for judicial approval, after notice and opportunity for comment, a plan of distribution specifying how the amount allocated to each Claim Category will be distributed among constituent claimants. Where Claim Categories consist solely of plaintiffs who have already been identified, the plan of distribution will set forth each claimant's specific percentage shares. For Claim Categories having class members not yet identified, the plan of distribution will set forth the manner in which individual percentage shares will be determined through a claims program.

Upon judicial approval of the plan of distribution, an interim claims program ("Supplemental Claims Program") will be conducted to distribute approximately $23 million plus interest which has been collected in the Native and municipality settlements. In the course of this claims program, plaintiffs will gather and process all information

necessary to compute percentage shares of all plaintiffs who claim a share of the recoveries, including those class members who have not yet been identified.

Based on the Supplemental Claims Program, Co-Lead Counsel will seek judicial approval of a list of Final Percentage Shares. This list will identify all persons and entities entitled to share in future recoveries, and specify for each a percentage share of recoveries.

Additional recoveries collected on behalf of signatory plaintiffs and class members, beyond the $23 million in hand from the Native and municipality settlements, will be distributed according to the Final Percentage Shares, following judicial approval. Once all recoveries in this litigation become certain and fully collected, there will be a "Final Distribution." In the Final Distribution, each signatory plaintiff's and class member's Final Percentage Share will be multiplied times the sum total of all recoveries allocated to signatory plaintiffs and class members, including recoveries already distributed. Previous payments will be deducted, and the net difference will be the final distribution to each claimant.[16]

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[16] At the time of each distribution, counsel for plaintiffs anticipate they will apply to the Court for an award of attorneys' fees. However, the Plan of Allocation provides that unreimbursed litigation expenses (estimated to eventually total approximately $25 million) will be deducted solely from punitive damage recoveries. Pursuant to fee orders entered by this Court on March 26, 1992, and the Alaska Superior Court on September 17, 1991, three percent (3%) of the recovery will be placed in a Consolidated Case Fund from which all counsel can apply for payment of fees based on their contribution to the successful prosecution of this litigation. In addition, the above orders provide that a Class Action Attorneys' Fees Fund is to be financed through percentage set-asides from class recoveries, subject to application to the Court. As described in the Plan of Allocation, all plaintiffs' counsel participating in the Plan

## II. THE COURT SHOULD APPROVE PRELIMINARILY THE PHASE IV SETTLEMENT AND THE PLAN OF ALLOCATION AS FAIR, ADEQUATE AND REASONABLE

Both the Phase IV Settlement and the Plan of Allocation are subject to review and approval by this Court under Rule 23 of the Federal Rules of Civil Procedure. While many of the Phase IV claimants are direct action plaintiffs, the Phase IV Agreement is also a class action settlement on behalf of the members of the Commercial Fishing Class, Native Class, and Landowner Class who have Phase IV compensatory claims. In addition, the Plan of Allocation will be binding on the members of all the classes which this Court has certified in the Exxon Valdez litigation, including all plaintiffs as members of the Mandatory Punitive Damages Class.

The Ninth Circuit has recognized that, in reviewing a proposed class action settlement, "the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable." Officers for Justice v. Civil Service Commission of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). A plan of allocation is reviewed under the same standard, and the district court's determination that a plan is fair and reasonable is reviewed only for an abuse of discretion. Class v. City of Seattle, 955 F.2d 1268, 1284-85 (9th Cir. 1991), cert. denied sub nom., Hoffer v. City of Seattle, ___ U.S. ___, 113 S.Ct. 408 (1992); In re Equity Funding Corp. of Am. Sec. Litig., 603 F.2d 1353, 1362 (9th Cir. 1979) (approving a settlement and plan of allocation); In re Ambase Corp., No. 90 Civ. 2011 (CSH), 1995 U.S. Dist. LEXIS 15516, at *4 (S.D.N.Y. Oct. 20, 1995) (approving a settlement including a plan of allocation of the settlement fund).

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have agreed to limit their fees on recoveries subsequent to the Alyeska settlement to an effective rate of 22.4% of the amount recovered, providing an additional benefit to the plaintiffs and class members.

At this juncture, plaintiffs do not ask the Court to finally approve the Phase IV Settlement and the Plan of Allocation. Rather, they seek only preliminary approval determining that it is appropriate to provide notice of the proposed Phase IV Settlement and Allocation Plan prior to a public hearing and final evaluation by the Court on these matters.

### A. The Standard for Preliminary Approval of Settlement Agreements

The Manual for Complex Litigation (Third) § 30.41 (citations omitted) sets forth procedures and criteria for preliminary approval of settlement and approval of notice to the class:

> Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation. In some cases this initial evaluation can be made on the basis of information already known to the court, supplemented as necessary by briefs, motions, or informal presentations of the settling parties.
>
> * * * * * * * *
>
> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Accord, Armstrong v. Board of Sch. Directors, 616 F.2d 305, 314 (7th Cir. 1980) (purpose of preliminary hearing is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing); In Re Mid Atlantic Toyota Antitrust Litig., 564 F.Supp. 1379, 1384 (D. Md. 1983).[17]

Here, the proposed Phase IV Settlement and Plan of Allocation fall well within the range of reasonableness sufficient to warrant the mailing of a notice apprising class members that the Court will consider final approval of those agreements. As discussed in Relevant Facts above and in II.B. and C. below, counsel for plaintiffs had a sound and reasonable basis for entering into those agreements, and the interests of the class members will be well served by their approval.

Counsel for plaintiffs have extensive experience in class action and mass tort litigation, and believe the Phase IV Settlement and Plan of Allocation are fair, reasonable and

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[17] Rule 23(d)(5) of the Federal Rules of Civil Procedure also grants the Court authority to enter an order preliminarily approving a class settlement. This rule empowers the Court to make "appropriate orders" dealing with procedural matters. See Newberg on Class Actions, (3rd ed. 1991), § 11.26. This authority has been exercised frequently to preliminarily approve class-wide settlements. See Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); In Re Beef Indus. Antitrust Litig., 607 F.2d 167 (5th Cir. 1979); Suffolk v. Long Island Lighting Co., 710 F.Supp. 1422 (E.D.N.Y. 1989), aff'd in relevant part, 907 F.2d 1295 (2d Cir. 1990); City of Detroit v. Grinnell Corp., 356 F.Supp. 1380 (S.D.N.Y. 1972), aff'd in relevant part, 495 F.2d 448 (2d Cir. 1974); In Re Four Seasons Sec. Laws Litig., 58 F.R.D. 19 (W.D. Okla. 1972); Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 322 F.Supp. 834 (E.D. Pa.), aff'd sub nom., Ace Heating and Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971).

adequate in light of the circumstances of this case. Many courts recognize that the opinion of experienced counsel supporting a settlement is entitled to considerable weight. See, e.g., Weinberger, 698 F.2d at 74; Kirkonan v. Bonelli, 695 F.Supp. 446, 451 (M.D. Cal. 1988); see also, Class v. Seattle, 955 F.2d at 1291 (listing experience and views of counsel as a factor in Court's determination to approve settlement) (citing Officers for Justice, 688 F.2d at 625).[18] Furthermore, "[t]his standard applies with as much force to the review of the allocation agreement as it does to the review of the overall settlement between plaintiffs and defendants." In re Chicken Antitrust Litig. Am. Poultry, 669 F.2d 228, 238 (5th Cir. 1982). Typically an allocation agreement which is the product of arm's-length negotiations between the attorneys for the class and individual plaintiffs obviates the need for a court determination of "the distribution of the settlement fund among the myriad claimants." Id. at 240 (quoting In re Equity Funding Corp., 603 F.2d at 1365).

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[18] In considering the potential settlement and plan of allocation, the trial court does not have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute (City of Detroit, 495 F.2d at 456), and need not engage in a trial on the merits (Officers for Justice, 688 F.2d at 625). Rather, "[t]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Officers for Justice, 688 F.2d at 625. In this regard, a court reviewing a settlement should keep in mind that "essence of settlement is compromise. . . . [and] 'a just result is often no more than an arbitrary point between competing notions of reasonableness.'" In re Corrugated Container Antitrust Litig., 659 F.2d 1322, 1325 (5th Cir. 1981), cert. denied sub nom., CFS Continental, Inc. v. Adams Extract Co., 456 U.S. 998 (1982).

The plaintiffs seek preliminary approval of interrelated agreements which will resolve, on the District Court level, the remaining claims of virtually all of the class and direct action plaintiffs in the consolidated Exxon Valdez Oil Spill Litigation. The courts have recognized a strong judicial preference towards settlement of complex class action litigation. See, e.g., Class v. City of Seattle, 955 F.2d at 1276, 1289 (citing Officers for Justice, 688 F.2d at 625, and In re Corrugated Container Antitrust Litig., 643 F.2d at 207). There is also a strong judicial preference favoring disposition of the claims of all interested parties – both class and individual – in a single settlement. See, e.g., In re Chicken Antitrust Litig. Am. Poultry, 669 F.2d at 238 (5th Cir. 1982).

To this end, courts have had no difficulty approving agreements which set forth the terms upon which parties will share in future recoveries. See, e.g., Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 269-70 (9th Cir. 1989); Lai v. Anthony, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,174, at 90,946 (D. Haw. July 5, 1991). Similarly, courts have approved settlements and plans of allocation which apply to both class and individual plaintiffs. City of Detroit, 495 F.2d at 462 (noting that a number of plaintiffs in the individual subscriber non-class actions were participating in the settlement along with the class action plaintiffs); see also In re GCC Richmond Works Cases, No. 2906, slip. op. at 4 (Cal. Sup. Ct., Contra Costa Cty., Nov. 13, 1995) (approving settlement resolving "all compensatory claims of the plaintiffs and class members who accept the settlement, and . . . all punitive damages claims of any individuals affected").

### B. The Phase IV Settlement Is Fair, Reasonable and Adequate

Plaintiffs' counsel have determined that it is in the best interests of the Phase IV plaintiffs to settle their Phase IV claims on the terms set forth in the Settlement Agreement. To litigate the Phase IV claims would require a time-consuming and expensive series of trials in which the

outcome would be subject to numerous risks and uncertainties.

Furthermore, plaintiffs' counsel are concerned that trial of the Phase IV claims would delay significantly the entry of final judgment. The amount of the Phase III verdict is of a magnitude whereby all claimants' reasonable expectations can be satisfied. Consequently, continuing delay in entry of the Phase III judgment has a vital significance to the Phase IV plaintiffs (and indeed all plaintiffs). The Phase IV Settlement reasonably addresses that concern by clearing the way for appellate review.

The fact that under the Settlement Agreement the Phase IV plaintiffs will receive no cash is not bar to approval. By agreeing to the settlement, the Phase IV plaintiffs will gain the right to participate in the distribution of the entire amount recovered against the defendants under the Plan of Allocation. Courts have approved settlement agreements under similar circumstances where a plan of allocation will protect the interest of all claimants in securing a fair and reasonable global settlement. See, e.g., In re Chicken Antitrust Litig. Am. Poultry, 669 F.2d at 238-39.

### C. The Plan of Allocation is Fair, Reasonable and Adequate

After consultation with clients and extensive deliberation, plaintiffs' counsel have concluded that the fairest, most expeditious way to allocate any funds that are recovered in the consolidated litigation is through the Plan of Allocation. That Plan is the product of serious, informed, and non-collusive negotiations among plaintiffs' counsel representing every category of claim included in the Plan of Allocation. Each lawyer and group of lawyers has been zealously representing their clients' interests, and Lead Counsel worked assiduously to protect and advance the interests of the whole. The virtually unanimous agreement on the Plan of Allocation which has been reached by the direct action plaintiffs confirms the lack of any conflict of

interest tainting the procedure and the vigorously arm's-length nature of the process.

The Plan of Allocation is the product of careful and thorough evaluation of all pertinent data available to plaintiffs' counsel. As discussed above, it employs reasonable and appropriate criteria with respect to the damage valuation figures and percentage shares attributable to the different claim categories.

Under the case law, the above factors render the allocation plan fair and reasonable. E.G., Class v. City of Seattle, 955 F.2d at 1284-85; Roberts v. Heim, Nos. C-84-8069 TEH, C-87-6174 TEH, C-88-3373, 1991 U.S. Dist. LEXIS 17782 (N.D. Cal. August 28, 1991) (finding formula fair and reasonable as used in allocation plan); In re Fortune Sec. Litig., No. C-83-3348(A) WHO, 1988 U.S. Dist. LEXIS 18505 (N.D. Cal. May 10, 1988) (same); see also In re Equity Funding Corp., 603 F.2d at 1358.

### D. This Is An Appropriate Time For The Court To Consider Approval Of The Plan Of Allocation

During the 16 months since the federal jury verdicts were returned, defendants have mounted an array of post-trial challenges, and they are expected now to pursue every possible avenue of appeal. We fully expect plaintiffs to prevail, but it is likely that several years will pass before plaintiffs' ultimate recoveries become certain and are fully collected. Obviously, until all recoveries are collected, no plaintiff can know the actual dollar amount of his or her individual share.

It is possible to fix each signatory plaintiffs' percentage share of future recoveries now, and there are compelling reasons to do so. First, as explained infra there is available for distribution approximately $23 million from settlements with the Exxon defendants by Native Alaskan and certain municipality plaintiffs. These settling plaintiffs understandably will not make their settlements available for

distribution among other signatory plaintiffs unless protected by a judicially-approved global allocation plan which assures them a fair share of other future recoveries.

Second, plaintiffs with claims scheduled to be tried in "Phase IV" of the federal court trial have agreed to accept the terms set forth in the Phase IV Settlement so that this litigation can move forward, but only if they too are protected by the matrix shares reflected in the Plan of Allocation.

In addition, plaintiffs overwhelmingly have expressed to counsel a desire to resolve their shares now and get on with their lives. Plaintiffs need and want to take advantage of a window of opportunity to complete the monumental task of processing individual claims before recoveries are collected. The number of claimants could reach 50,000 to 60,000, depending on the number of claims submitted by fishermen in "unoiled" fisheries. Experience with the Alyeska settlement and TAPL Fund payments leaves no doubt that this will be a massive, time-consuming undertaking. If claim processing is delayed until collection of recoveries, distribution could take years longer.

## III. PROPOSED NOTICE TO CLASS MEMBERS AND TIMETABLE

### A. The Court Should Authorize That Notice Be Given To The Class

Rule 23(e) requires notice of class action settlements. The Phase IV agreement is a class settlement because various members of the Commercial Fishing Class, the Landowner Class and the Native Class will be affected.[19]

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[19] In addition, Rule 23(d) of the Federal Rules of Civil Procedure authorizes the Court to make appropriate orders "(2) requiring, for the protection of members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all

Similarly, the Plan of Allocation is also a class action settlement for which notice is required. It resolves by compromise the allocation of punitive damage recoveries among all the members of the Mandatory Punitive Damage Class, as well as resolving the allocation of compensatory damage recoveries among the members of all the other certified classes.

**B. Proposed Notice**

Plaintiffs have submitted proposed Notices to be mailed to all plaintiffs individual class members concerning the Phase IV Settlement (Exhibit B to the Oesting Affidavit) and the Plan of Allocation (Exhibit D to the Oesting Affidavit). Exhibit E is a summary notice that plaintiffs propose to publish in various newspapers and other publications.

The purpose of the notice program is to alert and inform the class members and other interested persons of the Phase IV Settlement and the Plan of Allocation and of their right to object and/or appear at the Final Approval Hearing. The proposed form of notice apprises class members in a fair and neutral way of the terms of each of these agreements and of their impact on the class members if the Court grants final approval. See, In re Equity Funding Corp., 603 F.2d at 1361 (notice "must present a fair recital of the subject matter and proposed terms" and give an opportunity to be heard to all class members); In re Cement & Concrete Antitrust Litig., 817 F.2d 1435, 1440 (9th Cir. 1987); rev'd on other grounds, 490 U.S. 93 (1982) (notice must "alert those with adverse

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of the members of any step in the action; . . . (5) dealing with similar procedural matters." Notice of the Proposed Phase IV Settlement and Plan of Allocation is also authorized under that provision.

viewpoints to investigate and to come forward and be heard").[20]

### C. Proposed Timetable

Plaintiffs propose the following schedule, subject to the Court's approval:

1. Plaintiffs' Co-Lead Counsel shall mail the notices by February 2, 1996.

2. The summary notice shall be published on three separate occasions, on a business day during each of three consecutive weeks, with the first publication occurring no later than February 2, 1996.

3. Objections to the Plan of Allocation and the Phase IV Settlement shall be filed on or before March 18, 1996.

4. Plaintiffs' motion for final approval of the Plan of Allocation and Phase IV Settlement shall be filed on or before March 25, 1996.

5. Responses to Plaintiffs' motion for final approval of the Plan of Allocation and the Phase IV Settlement shall be filed on or before April 8, 1996.

6. The Final Approval hearing shall be scheduled on April 12, 1996, or as soon thereafter as the Court's calendar

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[20] Plaintiffs propose to include notice of the Phase IV Settlement and the plan of Allocation in the same mailing in order to avoid class member confusion. Among other things, notice concerning the Plan of Allocation is an integral part of notifying Phase IV claimants with respect to the proposed resolution of their claims, since the Phase IV claimants will look to the Plan of Allocation, rather than any cash payments by Exxon under the Phase IV Settlement itself, for their recoveries.

permits. This will allow time for the mailing of the Notice and for publication of the Summary Notice no less than 60 days prior to the hearing.

## IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that these motions be granted and that this Court issue orders (1) preliminarily approving the Phase IV Settlement and the Plan of Allocation; (2) setting a date and time for a court hearing on final approval of the Phase IV Settlement and the Plan of Allocation; (3) approving the proposed notices, and authorizing plaintiffs to disseminate notice as discussed above, and (4) approving the proposed timetable.

RESPECTFULLY SUBMITTED this 12th day of January, 1996.

DAVIS WRIGHT TREMAINE

By: /S/
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Liaison Counsel for Plaintiffs

Honorable H. Russel Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| In re: | ) | |
| | ) | Case No. A89-095- |
| The EXXON VALDEZ | ) | CV (HRH) |
| | ) | (Consolidated) |
| | ) | |
| THIS DOCUMENT RELATES TO | ) | |
| ALL CASES | ) | |
| | ) | |

MEMORANDUM IN SUPPORT OF ALL PLAINTIFFS' MOTION FOR ORDER PRELIMINARILY APPROVING PLAN OF DISTRIBUTION FOR SEAFOOD PROCESSOR CLAIMANTS

## I. INTRODUCTION

On June 11, 1996, the Court approved the Plan of Allocation of Recoveries Obtained by Plaintiffs in Litigation

Arising From the Exxon Valdez Oil Spill ("Plan of Allocation")[1] as fair, adequate, and reasonable and not resulting in a gross disparity in the distribution of funds among the parties. Order No. 317 at 49. The Plan of Allocation provides for distribution of all recoveries by Plaintiffs of both compensatory and punitive damages in the Exxon Valdez oil spill litigation using 51 separate Claim Categories.

In 50 of the 51 Claim Categories, the Court granted preliminary approval of the proposed Distribution Plans and scheduled an omnibus hearing on final approval of each of the 50 proposed Distribution Plans for August 13, 1997. Clerk's Docket No. 6999.

Plaintiffs did not file the 51st Plan of Distribution – that for seafoods processors – because Exxon recently asserted entitlement to participate in that Plan as the "assignee" of certain processor claims under the terms of partial releases from Dragnet Fisheries Co., Inc., Western Alaska Fisheries, Inc., Inlet Fisheries, Inc., Kodiak Salmon Packers, Inc., Copper River Fishermen's Cooperative, and Sea Hawk Seafoods, Inc. (the "Six Additional Processors").[2] Exxon tried a similar gambit with the Seattle Seven processors, and lost. Now Exxon is trying again, this time asserting claims on behalf of the Six Additional Processors.

This memorandum addresses Plaintiffs' request for separate approval of the processor Plan of Distribution.[3] This Plan, like the other 50 Plans, is the product of consensus among participating plaintiffs. Each participating processor has agreed to its benchmark compensatory damages figure

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[1] The Plan of Allocation was filed January 12, 1996, Clerk's Docket No. 6592.

[2] Declaration of David W. Oesting ("Oesting Decl.") ¶ 6 and exhibits C-I thereto.

[3] The proposed Processor Plan of Distribution is submitted as Exhibit A to the accompanying Declaration of David W. Oesting.

and agreed to be bound by that figure for purposes of the Plan of Distribution.[4] Plaintiffs hereby seek an Order preliminarily approving the Processor Plan of Distribution, which establishes fair, adequate, and reasonable objective criteria for participating in the Plan; identifies 33 processors who satisfy the eligibility criteria; and establishes a methodology for determining "Final Percent Shares" for each participating processor.

The proposed Processor Plan of Distribution does not identify Exxon as an eligible participant. Although Exxon almost certainly will object, the nature of that objection is unclear. Previously, Exxon has argued that its agreements with the Six Additional processors are "nearly identical in concept to the Seattle Seven agreement,"[5] which, if true, would doom its efforts to recover a portion of plaintiffs' punitive damages.

## II. SUMMARY OF ARGUMENT

The proposed Processor Plan of Distribution should be approved, in the court's discretion, as fair, adequate and reasonable. It is the product of extensive negotiations and almost-universal agreement among the participants in the Processor Claim Category.

Exxon has no right to participate in the Processor Plan of Distribution derived from Dragnet Fisheries Co., Inc., Western Alaska Fisheries, Inc., or Inlet Fisheries, Inc., because none of these processors is itself eligible to participate.

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[4] Oesting Decl. ¶¶ 3-5.

[5] Memorandum in Support of Motion of Defendants Exxon Corporation (D-1) and Exxon Shipping company (D-2) to Reconsider Order No. 317, at 7 ("nearly identical in concept to the Seattle Seven agreement"), 8 ("identical in concept"), Clerk's Docket No. 6818.

Although Exxon asserts claims under its settlement agreements with Copper River Fishermen's Cooperative, Sea Hawk Seafoods, Inc. and Kodiak Salmon Packers, Inc., none of those settlements give Exxon the right to participate in the Processor Plan of Distribution. These settlements, in which Exxon paid the processors to "assign" fractional punitive damages claims back to Exxon, released and extinguished these processors' claims by operation of law. Approval of the Processor Plan of Distribution is also consistent with the principles and goals of the class action device, which abhors class awards to parties with interests adverse to the class, and with the principles and goals of punitive awards, which would be undermined by distribution of such an award to the tortfeasor. Finally, approval of the Processor Plan of Distribution properly prevents Exxon from benefiting by changing its position regarding the nature and terms of the its settlement agreements with the Six Additional Processors.

## III. THE PROCESSOR PLAN OF DISTRIBUTION SHOULD BE APPROVED

### A. The Processor Plan of Distribution is the Product of Consensus, Which is a Critical Factor in Favor of Approval

The Processor Plan of Distribution is the product of collaboration and negotiation among Plaintiffs' counsel, after extensive consultation and meeting with Plaintiffs. It represents Plaintiffs' best effort at fashioning a consensus position balancing the many competing and often conflicting interests among claimants in the processor Claim Category. As a result of this effort Plaintiffs expect there to be no objection to or contest of the Plan, other than anticipating objections from Exxon. Oesting Decl. ¶¶ 3-5.

The Ninth Circuit has recognized that, in reviewing a proposed class action settlement, "the universally applied standard is whether the settlement is fundamentally fair, adequate, and reasonable." Officers for Justice v. Civil Service Commission of San Francisco, 88 F.2d 615, 615 [sic] (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). A Plan of

Allocation is reviewed under the same standard. Order No. 317 at 6. The District Court's determination that a plan is fair and reasonable is reviewed only for an abuse of discretion. Class v. City of Seattle, 955 F.2d 1268, 1284-85 (9th Cir. 1991), cert. denied sub. nom. Hoffer v. City of Seattle, 506 U.S. 953, 113 S. Ct. 408 (1990); In re Equity Funding Corp. of Am. Sec. Litig., 603 F.2d 1353, 1362 (9th Cir. 1979) (approving a settlement and plan of allocation); In re Ambase Corp., No. 90 Civ. 2011 (CSH), 1995 US. Dist. LEXIS 15516, at *4 (S.D.N.Y. Oct. 20, 1995) (approving a settlement including a plan of allocation of the settlement fund).

A Court should disapprove of an agreement among all affected parties only with "considerable circumspection." Jamison v. Butcher & Sherrerd, 68 F.R.D. 479, 481 (E.D. Pa. 1975). As the Court advised in Officers for Justice, "It must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution." 688 F.2d at 625; see also Moore v. San Jose, 615 F.2d 1265, 1271 (9th Cir. 1980); Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Fisher Bros. v. Cambridge-Lee Indus., Inc., 630 F. Supp. 482 , 487 (E.D. Pa. 1985). Where all eligible processors are in agreement, the court should look with favor on the proposed Processor Plan of Distribution.

B. The Plan's Criteria for Participation are Fair, Adequate, and Reasonable

The proposed Processor Plan of Distribution easily satisfies these legal standards. The Plan establishes four criteria for participation in the plan as a processor. To qualify as a Participating Processor, a claimant must: (1) have been engaged in commercial seafood processing operations and suffered economic loses proximately caused by the Exxon Valdez oil spill; (2) be a signatory to plaintiffs' joint prosecution agreement; (3) have filed a timely lawsuit on its own behalf as a direct action plaintiff or putative class

representative; and (4) not have settled and released all its claims against the Exxon defendants.

Each of these criteria is fair and reasonable:

1. Economic Loss as a Proximate Result of the Exxon Valdez Oil Spill

The Plan of Allocation defined the Processor Claim Category as:

> [L]imited to claims by persons and entities engaged in commercial seafood processing operations, for economic losses caused by the spill. Processor Matrix Damages include lost profits from 1989 through 1995 caused by the spill, and realized losses of equity and assets by processors driven out of operation by the spill, discounted by 50%.

Plan of Allocation at 25. Under this criterion, processors that did not conduct operations at the time of the spill or did not suffer economic losses at the time of the spill or did not suffer economic losses as a proximate result thereof are outside the Plan of Allocation and are not entitled to participate in the Plan of Distribution.

2. Signatory to Plaintiffs' Joint Prosecution Agreement

Under the law of the case, seafood processors have no entitlement to recover compensatory or punitive damages, except for the contract rights that arise under the Joint Prosecution Agreement and the Plan of Allocation among and between those signatories. See order No. 174 (entering summary judgment against all seafood processors); Order No. 184 (confirming summary judgment against Copper River Fishermen's Cooperative). If a processor failed to subscribe to the joint prosecution agreement, it has no contractual right to the benefits of that risk-sharing arrangement.

3. Filed Timely Action Within Statute of Limitations Period

At one time, Seafood processors were part of the "area business class" certified by the Alaska State Court. In March 1994, however, this Court decertified the area business class and required putative members of that class to file lawsuits on their own behalf within 180 days of March 14, 1994. See Order Certifying Commercial Fishing Class, Native Class and Landowner Class (Mar. 14, 1994) ("Class Certification Order"), Clerk's Docket No. 4653.

Processors that failed to file a timely lawsuit as required by the Class Certification Order are barred from any recovery against Exxon. The Court made this clear in Order No. 317, in which the Court dismissed objections to the Plan of Allocation filed on behalf of two purported processors who failed to file timely lawsuits, and held:

> In its order certifying the commercial fishing class, native class and landowner class, the court set September 7, 1994, as the last date upon which business entities could file suit for damages resulting from the oil spill.

Id. at 14-15. If a processor failed to file a timely lawsuit, it is not entitled to participate in the Plan of Allocation or the specific Plan of Distribution for seafood processors.[6] This criterion ensures that all Participating processors have timely preserved their right to assert a claim.

4. Retained Claims against the Exxon Defendants

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6 As noted below, this criterion excludes three seafood processors – Dragnet Fisheries Company, Inc., Western Alaska Fisheries, Inc. and Inlet Fisheries, Inc. – who failed to file lawsuits in compliance with the Class Certification Order. These three processors are excluded from the list of 33 Participating Processors.

A processor that has settled and released all its claims against the Exxon defendants cannot participate in the Plan of Allocation or the processor Plan of Distribution. In the context of the Seattle Seven, this Court ruled:

> The court finds that the Seattle Seven specifically and unequivocally settled their punitive damages claims in their Agreements with Exxon; no additional punitive damages may be awarded. . . . Having elected to settle their punitive damages claims against Exxon, the Seattle Seven could not also perpetuate such claims for the purpose of taking a share of punitive damages recovered by others—class plaintiffs.

Order No. 317 at 25-26. See also Order No. 327 at 3 ("Exxon paid the Seattle Seven approximately $70 million in satisfaction of all the Seattle Seven's claims"). In the context of Exxon's request for an adjustment of the Phase III verdict, this Court applied the rule broadly to other processors:

> [T]he 32 individuals and entities who signed releases extinguished their punitive damages claims by releasing them prior to certification of the mandatory punitive damages class.

Order No. 326 at 4.

This criterion precludes the claims of other processors (if any) that surrendered all claims to Exxon.

C. Thirty Three Processors Satisfy These Criteria

Applying these criteria fairly and reasonably, Plaintiffs have concluded that 33 seafood processors (listed on Table 1) are eligible to participate in the processor Plan of Distribution.

Exxon is not among the 33 processors listed because it fails to satisfy each of the fair and objective criteria for Participation in the processor Plan of Distribution: Exxon is

not a seafood processor that suffered economic losses proximately caused by the Exxon Valdez oil spill; Exxon is not a signatory to the Plan of Allocation; Exxon did not sue itself within the statute of limitations period; and Exxon did not retain claims against itself.

## IV. EXXON CANNOT PURCHASE THE RIGHT TO SHARE N THE PUNITIVE DAMAGES IT IS OBLIGED TO PAY OTHERS

Just as Exxon is disqualified from participating in the Plan of Allocation in its own right, Exxon is disqualified from participating in some other guise. Nonetheless, Exxon has asserted its entitlement to "participate in the matrix share allocated to processors in the plaintiffs' and class members' plan of allocation." Oesting Decl. ¶ 6 and Exhibit I thereto. This intrusion is neither fair nor reasonable.

Exxon's alleged right to participate in the Processor Plan of Distribution is derived in part from its settlement agreements with Dragnet Fisheries Co., Inc. ("Dragnet"), Western Alaska Fisheries, Inc. ("Western"), and Inlet Fisheries, Inc. ("Inlet"). Oesting Decl. ¶ 6. But each of these three processors failed to file suits against Exxon on or before September 7, 1995. Id. ¶ 7. Under this Court's Class Certification Order,[7] a processor's failure to assert a timely claim on its own behalf precludes that processor from participating in the Plan of Allocation. Order No. 317 at 14-15 (rejecting the claims of ANPAC, Inc. and Western Sea, Inc.). Dragnet, Western and Inlet are not entitled to participate in the Plan of Allocation or the Plan of Distribution. To the extent Exxon asserts claims through or in the stead of these excluded processors, Exxon's claim must fail.[8]

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[7] Clerk's Docket No. 4653.

[8] Even if these three processors could assert claims, any attempt to "assign" those claims to Exxon would be ineffective.

Exxon also asserts rights derived from its settlements with Copper River Fishermen's Cooperative ("Copper River"), Sea Hawk Seafoods, Inc. ("Sea Hawk") and Kodiak Salmon Packers, Inc. ("Kodiak").[9] But these agreements, which purport to be partial "assignments" of punitive damage claims, have the legal effect of a simple release of claims for 1989 damages. As Exxon already knows, this type of "assignment" is subject to attack and may be ineffective as a matter of law:

> Exxon and six processors entered into settlement agreements that released compensatory damages claims but assigned punitive damages claims to Exxon; Exxon paid processors $13.6 million in such settlements. . . . This form of transaction, however, still presented a risk: If assignment of a punitive damages claim to the punitive damages defendant were treated not as an assignment but as an extinguishment of the claim (and therefore equivalent to a release) the settlement would have the same vulnerability as the earlier release-of-all-claims version.

Oesting Decl. ¶ 8 and Exh. J thereto at 7 (emphasis by Exxon; record cites omitted). Exxon correctly identified the risk. Just as its "release-of-all-claims" settlement agreements do not reduce Exxon's liability for punitive damages,[10] the Copper River, Sea Hawk and Kodiak agreements, which seek to accomplish the same thing by calling the release an "assignment," do not give Exxon the

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9 Oesting Dec. ¶ 6 and exhibits F, G & H thereto. All three agreements settle claims for calendar year 1989. The Exxon/Kodiak agreement also settles claims for the first six months of 1990. Oesting Decl. ¶ 6 and Exh. H ¶ 1 thereto. For convenience, all these settled claims are referred to herein as "1989 claims."

10 See Order No. 326 at 4.

right to participate in the Processor Plan of Distribution. The purported assignment to Exxon of punitive damages claims *against Exxon* extinguishes those claims as a matter of law.[11]

Exxon's participation in the Processor Plan of Distribution would impermissibly allow Exxon to dismember what was intended to be a unified and unitary punitive damages award. See Order No. 326 at 2-4. Exxon's participation would also undermine the important principles and goals of punitive damages awards by allowing the tortfeasor to effectively diminish its liability. See Order No. 317 at 29 ("The jury determined that $5 billion, and not a penny less was the amount reasonably necessary to punish and deter Exxon, and must pay the amount of punitive damages that the jury determined"); Order No. 327 at 10 (noting that the jury "worked long and hard" to arrive at its Phase III verdict); Order No. 326 at 3 (subdividing the punitive damages award would "vitiate the jury's role in determining the amount necessary to punish and deter").

Finally, Exxon should not be allowed to benefit from changing its position regarding the nature and terms of its agreements with the Six Additional Processors. At trial, Exxon argued that it gave these processors money and never asked for more than a receipt. Order No. 327 at 4. Now, Exxon apparently claims that it obtained not only a receipt, but a contractual right to participate in the punitive damages the jury found Exxon liable to pay its victims. Exxon is estopped from benefiting by this reversal of position. Id. at

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[11] If a duty is to owed, it must be owed to someone else. See Matter of Lockard, 884 F.2d 1171, 1178 n.13 (9th Cir. 1989) ("He cannot, after all, have a claim against himself"); Bartneck v. Dunkin, 81 Cal. Rptr. 428, 430-431 (Cal. App. 1969) ("the assignment of the claim to some of the defendants is ample evidence that there was an intent to release those defendants from any further liability").

8 ("It is Exxon's expectations which the court declines to enforce").

Exxon is not entitled to participate in the Processor Plan of Distribution. It seeks to stand in the shoes of processors that either had no valid claims to assert, or surrendered their rights to sue Exxon for 1989 punitive damages by "assignments" that have the legal effect of releases. The Processor Plan of Distribution should be approved as proposed, excluding Exxon from participation.

## V. CONCLUSION

Plaintiffs respectfully request the Court enter an Order Preliminarily Approving the Processor Plan of Distribution. The Plan establishes fair and objective criteria for participation in the Processor Claim Category, identifies 33 processors that meet those criteria, and presents a sound methodology for determining the "Final Percent Shares" for participating processors. The proposed Plan is fair, adequate and reasonable.

The proposed Plan does not identify Exxon as a participating processor. Copper River Fishermen's Cooperative, Sea Hawk Seafoods, Inc. and Kodiak Salmon Packers, Inc. are listed as participating processors, but their status does not entitle Exxon to claim under the Plan. If anything, Exxon obtained nothing more than releases from Copper River, Sea Hawk, and Kodiak. It cannot use those releases to reclaim some of the punitive damages it owes to injured plaintiffs.

Respectfully submitted this 13th day of May, 1997.

LEAD COUNSEL FOR
PLAINTIFFS

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By: /S/

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
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| In re: | ) | |
| | ) | Case No. A-89-095 CI |
| the EXXON VALDEZ | ) | (HRH) |
| | ) | (Consolidated) |

This Document Relates to Case No. A91-141

(P-1312 – Cook Inlet Processing)

PLAINTIFF COOK INLET PROCESSING'S OBJECTION TO THE PLAN OF DISTRIBUTION OF RECOVERIES OBTAINED ON BEHALF OF PROCESSORS

The above-captioned plaintiff, Cook Inlet Processing, (hereinafter "CIP"), is objecting to the processors' Plan of Distribution for the reasons stated below and respectfully requests the Court consider its formal objection.

## INTRODUCTION

The central issue before the court is the reasonableness of the proposed processor Plan of Distribution. The proposed Processor Plan of Distribution destroys the compensatory and punitive claims of CIP.

The plaintiffs' Damage Committee determined the compensatory damage losses sustained by CIP to be $11,846,297 before the processor category 50% discount,

pertaining to claimed years of loss, 1991-1995. (No claim was submitted for 1989 or 1990.)

As a result of recent action on the part of the Plaintiffs' Damage Committee, the Processor Plan of Distribution, as currently proposed would provide CIP recovery of approximately $50,000-$60,000.

For the reasons set forth below, CIP opposes and objects to the Proposed Processor Plan of Distribution.

## THE BUSINESS

Cook Inlet Processing is a wholly Alaskan owned Corporation, established in 1977 with the purchase of its first fish plan in Nikiski, Alaska. Originally formed as an independent C-corporation, CIP merged with Polar Equipment, Inc., on April 1, 1990, and elected sub-chapter S status effective that date. The company now operates as Polar Equipment, Inc., d/b/a CIP.

From 1977 through 1986 CIP processed salmon, herring, and halibut at its Nikiski plant during the months of April through September. Salmon was CIP's primary focus during these years. In 1987 CIP acquired the small processing barge, the Smokwa Shell, and began an operation in Kodiak, Alaska. CIP purchased and processed 1.4 million lbs. of salmon, halibut, herring, crab, and grey cod its first year in Kodiak, and increased its purchases of the same to 4.2 million lbs. in 1988, including almost 2 million lbs. of salmon.

In order for CIP to continue its growth in Kodiak, and especially in order to process more salmon, a larger plant was necessary. CIP initiated negotiations on a renewable five year lease with the City of Kodiak for the Gibson Cove facility in the fall of 1988. CIP then spent over One Million Dollars making repairs and improvements to ready the facility for processing operations beginning April 1, 1989.

With the occurrence of the Exxon oil spill at the end of March, 1989 CIP having carefully cultivated a credible presence in Kodiak, having just spent the winter negotiating for additional fishing and tender fleets, and having spent a sizeable amount of its money preparing a new plant in Kodiak, faced the dismal prospect of the following:

- No herring fishing in Prince William Sound;
- Limited herring fishing in Kodiak;
- No drift gillnet salmon fishing in Cook Inlet;
- Virtually no salmon fishing in Kodiak;
- Unavailability of tenders due to their Exxon charters;
- A shrinking labor pool unwilling to work for less than the $16 per hour Exxon was paying to wipe oil from rocks;
- A fleet so psychologically damaged, first by the impact of the spill, and secondly by the prospect of money from Exxon, that it would not leave the harbor;
- A market afraid that it might be at risk of contaminated product;
- An entire salmon processing season and immediately foreseeable future wherein business decisions had to be made within the realm of whether Exxon would believe CIP had acted to sufficiently mitigate its circumstance.

## PARTIAL RELEASE

On May 22, 1990, CIP's representatives signed a document entitled "Partial Release". (See, Exhibit "A").

When executing the "Partial Release", CIP was experiencing extreme financial hardship as a result of the spill. At the time of execution, CIP was only aware that the document entitled "Partial Release" might affect its compensatory claims through 1990. It was not the intent of CIP to release Exxon from any future compensatory damages beyond 1990.

## PROCEDURAL POSTURE

CIP's claim was submitted to Plaintiffs' Damages Committee ("Committee"). After several telephone conferences with CIP's former counsel, Faegre and Benson, and several memorandums and appeals to the Committee that dealt with the processor Plan of Distribution, Committee denied CIP's appeals.

CIP's former counsel, Faegra [sic] and Benson, advised CIP that they could not continue representing CIP should it wish to object to the Plan of Distribution. Accordingly, CIP files this claim in pro se, and is now faced with the task of retaining counsel willing to handle its claim through the objection process.

## SUPPORTING DOCUMENTATION

Attached hereto as Exhibits are certain documents which support and otherwise outline the procedural process and decisions of the Committee with respect to the evaluation of CIP claims. CIP reserves its rights to further brief this matter, and to submit additional documentation as may be required by the Court.

## OBJECTIONS

CIP objects to the methodology employed by the Committee in reducing its share under the Proposed Processor Plan of Distribution. In particular CIP is not receiving any of the punitive damage award and yet is deprived of receiving its agreed upon compensatory losses.

CIP hereby provides notice, or its incorporation by this reference, of other objections submitted by other processors regarding this issue. CIP believes itself to be similarly situate [sic] to other objecting processors and incorporates and reserves such applicable objections. As noted above, CIP is presently seeking counsel to represent it in this process.

## CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Court modify the proposed Plan of Distribution so as to provide adequate compensation to plaintiff CIP.

DATED this 27th day of June, 1996.

/S/
Michael Shupe, President of
Cook Inlet Processing
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I HEREBY CERTIFY that on
June 27, 1997 I served copies of
the foregoing by certified mail upon:

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/s/

FILED AUG 08 1997
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
/s/, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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| In re | ) | |
| | ) | Case No. A-89- |
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| | ) | (Consolidated) |
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This Document Relates
to Case No. A91-141

SUPPLEMENTAL NOTICE OF POSITION BY POLAR EQUIPMENT, INC. D/B/A COOK INLET PROCESSING RELATING TO OBJECTIONS BY COOK INLET PROCESSING TO PLAN OF DISTRIBUTION OF RECOVERIES OBTAINED ON BEHALF OF PROCESSORS

COMES NOW Polar Equipment, Inc. d/b/a Cook Inlet Processing by and through Phillip Paul Weidner of Phillip Paul Weidner & Associates, Inc., and hereby gives notice that as reflected by Exhibits A, B, and C herewith, that they are requesting and/or demanding their full procedural, statutory, constitution, and due process rights in this matter, including their full rights to discovery, to the disqualification of David Oesting from further participating due to a conflict of interest and personal bias and animosity, to a de novo decision on their objections by the plaintiffs' committee uninfluenced by Mr. Oesting, to litigation in an appropriate forum before a jury and/or at a minimum a judge, and to the escrow and non-disbursement of their portion of the proceeds pending final resolution of this matter.

This position will be further amplified at oral argument at the hearing now set for objections on August 13, 1997, and by further briefing and argument if the court desires and/or allows same.

Accordingly, the Court is respectfully requested to consider this pleading and exhibits, to honor the requests therein, and to order that Polar Equipment, Inc. d/b/a Cook Inlet Processing have their full rights as requested, and that after appropriate proceedings, and/or pursuant to immediate order of the court, that Polar Equipment, Inc. d/b/a Cook Inlet Processing be allowed their full share of the proceeds insofar as the reasons asserted by the Plaintiffs' Committee for denying them same are not valid

RESPECTFULLY SUBMITTED this 8th day of August, 1997.

WEIDNER & ASSOCIATES, INC.
A Professional Corporation

By: /S/
Phillip Paul Weidner

I hereby certify that a copy of the foregoing was mailed by certified mail on this 8th day of August, 1997, to:

David W. Oesting
Davis Wright Tremaine
550 West 7th Avenue, Suite 1450
Anchorage, Alaska 99501

Patrick Lynch
O'Melveny & Myers
400 South Hope Street, 15th Floor
Los Angeles, California 90071

/S/
Phillip Paul Weidner

**RECEIVED**
**AFTER 4:30 P.M.**

**LODGED**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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| In re | ) | Case No. A-89-095 |
| | ) | CI (HRH) |
| the EXXON VALDEZ | ) | (Consolidated) |
| | ) | |

This Document Relates
to Case No. A94-0417

SECOND SUPPLEMENTAL NOTICE OF POSITION BY POLAR EQUIPMENT, INC. d/b/a COOK INLET PROCESSING RELATING TO OBJECTIONS BY POLAR EQUIPMENT, INC. d/b/a COOK INLET PROCESSING TO PLAN OF DISTRIBUTION OF RECOVERIES OBTAINED ON BEHALF OF PROCESSORS

COMES NOW plaintiff Polar Equipment, Inc. d/b/a Cook Inlet Processing, by and through Phillip Paul Weidner of Phillip Paul Weidner & Associates, Inc., and hereby files the instant Second Supplemental Notice Of Position by Polar Equipment, Inc. d/b/a Cook Inlet Processing Relating to Objections by Polar Equipment, Inc. d/b/a Cook Inlet Processing to Plan of Distribution of Recoveries Obtained on Behalf of Processors.[1]

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[1] This Second Supplemental Notice is filed in conjunction with a similar Second Supplemental Notice filed by Nautilus Marine Enterprises, Inc. This document addresses both Nautilus Marine Enterprises, Inc.'s position and Polar Equipment, Inc. d/b/a Cook Inlet Processing's position insofar as their positions are substantially similar with the exception of certain details of the purported releases signed and monetary figures of compensatory damages.

In particular, said plaintiff herein is requesting permission of the court to consider this Second Supplemental Notice in light of the comments of Mr. Jamin and Mr. O'Neil in open court on August 13, 1997, concerning the referenced plans.

That is, Mr. Jamin indicated in his response to Mr. Weidner's objection that the committee would certainly consider the issue of compensatory damages, i.e. appropriate participation by Polar Equipment, Inc. d/b/a Cook Inlet Processing, in the proceeds of judgment and/or settlement such that they are adequately compensated for their compensatory damages. That is, the court should be fully aware as to the true position of Polar Equipment, Inc. d/b/a Cook Inlet Processing concerning the amount of compensatory damages suffered, the detrimental reliance upon the committee's position that they would be compensated for said compensatory damages, and the fact that it was amplified by counsel at oral argument that they are not "pawns" of Exxon, but in fact are adverse to Exxon.

Accordingly, the court is respectfully requested to consider the following:

1. In point of fact, Exxon has not taken any formal position to lend any credence to the fact that the alleged releases/covenants not to sue/assignments are valid. That is, they have not asserted any affirmative defense or counterclaim and have not made any formal demand upon Polar Equipment, Inc. d/b/a Cook Inlet Processing as to asserting the right to share in the proceeds of settlement and have not asserted any liens in that regard;

2. Both Polar Equipment, Inc. d/b/a Cook Inlet Processing and Nautilus Marine Enterprises, Inc. detrimentally relied upon their belief that they would be participating in the proceeds of the settlement according to the matrix damages when they agreed to waive their phase four rights. That is, even if the alleged releases are valid they are only partial releases and their specific language reserves the right of Nautilus Marine Enterprises, Inc. to seek

damages post-1989 and the right of Polar Equipment, Inc. d/b/a Cook Inlet Processing to seek damages post-1990. It is Horn Book Law that one cannot sign a release for future causes of actions. Accordingly, at the time Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing were induced to give up their phase four damages, they had a right to rely upon the fact that the committee would be allowing them to participate in the proceeds of the verdict to the extent that they would be reimbursed for said damages and it is unjust now to change the playing field in that regard;

3. Both Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing strongly dispute any allegation that they misled the committee. They were never asked if they had signed any purported releases, assignments, etc., as it was not an issue at that time. Exxon had not asserted any rights or claims based upon the alleged releases by way of affirmative defense or counterclaim. Accordingly, they were operating in good faith at the time they relied upon the joint prosecution agreement and at the time they relied upon the representations of the committee that they would be sharing in their matrix damages. At that time they gave up their phase four claims;

4. It is manifestly unjust to deny Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing their compensatory damages. In point of fact, the committee, both orally and in writing, had previously made assurances that they would receive their compensatory damages at least through December 1996. This caused said plaintiffs not to take certain acts to challenge the committee action in reliance upon its representations and the committee cannot change their position at this time;

5. As to the subject of compensatory damages, the jury's verdict for the fishermen was only $350 million, but by virtue of the fact that they are now going to share in the punitive damage portion of the verdict, they will

receive substantially more than the jury found their compensatory damages to be. At the same time Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing were induced to give up their phase four right to seek appropriate compensatory damages, detrimentally relying on the representations of the committee.[2] [3] [4]

6. There is a distinct difference between "the Seattle Seven," in terms of their post-suit settlements

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[2] Contrary to Mr. Jamin's representation that the committee is not paying claimants who have signed said "releases," in point of fact many of the fishermen signed releases substantially similar to Polar Equipment, Inc. d/b/a Cook Inlet Processing and Nautilus Marine Enterprises, Inc. but apparently through some "letter agreement" Exxon has not been asserting the validity of those releases. This is no different from Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing's position insofar as Exxon has waived its right to assert the validity of the releases.

[3] That is, if either Polar Equipment, Inc. d/b/a Cook Inlet Processing or Nautilus Marine Enterprises, Inc. had not been induced to rely upon the committee's representations and waive their phase four damages, and particularly, if they prevail with regard to the appeal of the Robins Dry-dock ruling, in point of fact even their compensatory damages for post-1990 that would be awarded by the jury are far in excess of the sums they are seeking.

[4] Under the present plan, which is inequitable on its face, the fishermen who were subject to a jury verdict that their compensatory damages were only $350 million will be receiving compensatory damages under the matrix of approximately $1.5 billion, while Polar Equipment, Inc. d/b/a Cook Inlet Processing and Nautilus Marine Enterprises, Inc., who have had compensatory damages of millions of dollars, i.e., far in excess of the $70,000 and $100,000, respectively, which the committee now wants to pay them, will be receiving no realistic compensation.

and assignments, acting in concert with Exxon as opposed to Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing with their coerced pre-suit partial releases/assignments/covenants not to sue which were repudiated by filing this suit and which were not asserted by Exxon with affirmative defenses and/or counterclaims;

A proposed plan for allocation of proceeds cannot be approved unless the allocation is reasonable. All claimants are required to be treated similarly unless there are differences between them which must be based on objective grounds. If a proposed plan of allocation is arbitrary, capricious, unfair, or results in fundamental unfairness, it must be rejected by the court. Such a proposed allocation, as now requested by the committee, is manifestly unjust.

It is a basic requirement for a reasonable allocation that claimants who are similarly situated must be treated the same. There shall be no differences between them with regard to the allocation. If they are not treated the same then the proposed allocation must fail and must be rejected by the court.

In the present case, Polar Equipment, Inc. d/b/a Cook Inlet Processing and Nautilus Marine Enterprises, Inc. have not been treated fairly. The committee has proposed a plan of allocation which is unreasonable and which is not founded on objective grounds or other legitimate basis. More specifically, the committee objects to Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing's participation in a portion of the damages. Substantively, the proposed allocation by the class committee would result in recovery to Nautilus Marine Enterprises, Inc. of approximately $100,000 in contrast to the nearly $6,000,000 they would receive in the event they were treated the same as other claimants in this case. Similarly, the proposed allocation with respect to Polar Equipment, Inc. d/b/a Cook Inlet Processing provides for an allocation of $70,000 in contrast to nearly $12,000,000. The basis of these differences is founded in partial releases executed by

these processors. This is the sole basis for the class committee treating these processors differently.

At this juncture, it is significant to note that Nautilus Marine Enterprises, Inc. was a direct plaintiff in an original action against Exxon. In connection with that lawsuit Exxon waived any affirmative defense that Nautilus Marine Enterprises, Inc. directly or indirectly waived, released, assigned, or in any way lost its right to bring a lawsuit against it. Exxon has not asserted these claims. Similarly, Polar Equipment, Inc. d/b/a Cook Inlet Processing also brought a direct action and Exxon again failed to assert any affirmative defenses based on the partial releases.

At this juncture, it is also important to emphasize that the class committee, while they profess to have treated Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing fairly, have failed to do so. They have material conflicts of interest which have resulted in material prejudice to both of these processors. These processors relied on agreements regarding the allocation, which were reached prior to the deadline for these processors to file timely objections. After the expiration of these deadlines, the class committee changed its position (once again) which resulted in the current proposal effectively denying Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing any meaningful recovery in this case. At the same time, the class committee, who are effectively the attorneys for these processors, withdrew shortly before the present hearing.

The releases signed by Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing are virtually identical and substantively the same as numerous other releases signed by other claimants in this case. The particulars and exact numbers of these releases are unknown because the class committee has refused to provide any cooperation, refused to produce documents, and refused to permit discovery. However, the key members of the class committee, Mr. O'Neil, Mr. Oesting, and Mr. Gerry, have numerous other clients who are in the exact same position as

Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing. Ironically, Mr. Oesting and Mr. O'Neil have acknowledged and conceded that their clients have signed releases which are substantively the same as those in controversy.

The class claimants, who are represented by Messrs. O'Neil, Epstein, Gerry, and other class committee members, have not been treated the same as Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing. These class members, who are frequently regarded as the driving force of the committee, have made sure that their clients have received full and complete compensation to the detriment and injury and prejudice of Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing. Again, the precise number of claimants who are in this position is unknown; however, it is not inconceivable that there are literally hundreds and potentially thousands of Mr. O'Neil's clients alone who fall into this category and who are taking full benefits under the proposed allocation.

Under these circumstances the proposed allocation does not meet any of the requirements of law. There is a material difference in the treatment of claimants who are situated in substantively the same position. This is manifestly unreasonable and unjust and may be rejected on this ground or on the basis that it is otherwise arbitrary and capricious.

Alternatively, the position of the class committee can be analyzed from the perspective that Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing should be denied any benefit from the class recovery since they have lost their claims against Exxon. However, whether this is true or not is immaterial to their entitlement under the joint participation agreement. More specifically, if the principle is that a claimant cannot receive a recovery because he does not have an actionable cause of action, then none of the class claimants other than the fishermen are entitled to anything.

This court has already ruled that under the Robins Dry-dock decision none of the claimants other than the fishermen have any actionable claim in this case. Consequently, if we apply the principle currently being employed by the class committee to the other claimants, then all other claimants should be denied any other relief.

Ironically, it is interesting to note that even Mr. Oesting during oral arguments before the court on Wednesday, August 13, 1997, noted that the class committee employed numerous "arbitrary rules" to differentiate between claimants. The use of arbitrary rules is unacceptable. This is further noted by Exxon's attorney's comments that the allocation adopted by the class committee is nothing more than a "collection of arbitrary rules." Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing agree.

In the present case there are several distinguishing factors which the court should be fully cognizant of in analyzing this issue. These distinguishing factors are:

1. Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing were direct plaintiffs and brought independent claims and lawsuits against Exxon. Exxon did not assert any defense or counterclaim on the basis of partial releases.

2. The proposed allocation does not treat claimants who signed partial releases the same. The fishermen, other processors, and other claimants who signed similar documents are not being excluded from the allocation. This is disparate treatment among these plaintiffs.

3. The formula employed by the class committee involved double dipping. The committee has adopted a formula based upon its analysis of each claimant's damages. Damages are then allocated amongst the claimants with adjustment for risk of litigation. The committee's

determination of the damages for the fishermen's class exceeds that determined by the jury by approximately five-fold. As a consequence, they receive a disparate percentage of any recovery with regard to both the actual and punitive damages.

4. Any distinction between punitive and actual damages for purposes of allocation is premature pending final appeal of this case. However, an allocation based on the proposed formula would prejudice claimants such as Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing in the event of a reversal of the Robins Dry-dock decision[5] or if the partial releases are ineffective or void on other substantive or public policy grounds.

5. Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing were not able to file certain objections on the basis of an agreement and proposed allocation with the class committee. After the deadline to file objections had passed the committee unilaterally changed its mind.

6. The committee members, who are functioning as the attorneys for these processors, have breached their fiduciary duties to the plaintiffs and have taken a position adverse to those of Nautilus Marine Enterprises, Inc. and Polar Equipment, Inc. d/b/a Cook Inlet Processing. The appropriate position would be for them neither to advocate nor object to an allocation involving the claimants and refer it to independent counsel. This breach of fiduciary duty has been compounded by the committee's wavering tactic with regard to the allocation and obstructionist tactics and refusing to cooperate, including to provide discovery or copies of related documents.

## SUMMARY AND CONCLUSION

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5 The Robins Dry-dock decision is still on appeal, having been argued in June of 1998.

Polar Equipment, Inc. d/b/a Cook Inlet Processing and Nautilus Marine Enterprises, Inc. are in a procedural posture that clearly distinguishes them from that of the Seattle Seven. The releases/covenants not to sue/assignments have never been asserted by Exxon by way of affirmative defense or counterclaim and they have waived any right to assert same and, in point of fact, have never made a formal demand to assert same. Polar Equipment, Inc. d/b/a Cook Inlet Processing, and Nautilus Marine Enterprises, Inc. have not acted in conjunction with Exxon. They have detrimentally relied upon the committee representing that they would at a minimum be paid compensatory damages and in point of fact should be allowed to share on an equal basis under the matrix with other plaintiffs as to both compensatory and punitive damages.

RESPECTFULLY SUBMITTED this 23rd day of September, 1998.

WEIDNER & ASSOCIATES, INC.
A Professional Corporation

By: /s/
Phillip Paul Weidner
ABA No. 7305032

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered by hand/mail/fax on this 23rd day of September, 1998, to:

Douglas J. Serdahely
Bogle & Gates
1031 W. 4th Ave., Suite 600
Anchorage, AK 99501

David W. Oesting
Davis Wright Tremaine
550 West 7th Avenue, Suite 1450
Anchorage, Alaska 99501

Patrick Lynch
O'Melveny & Myers
400 South Hope Street, 15th Floor
Los Angeles, California 90071

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**Federal Rule of Civil Procedure 23**

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.
(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.
(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.
(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.
(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be

given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.